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IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—*P.R. Gokulakrishnan, O.C.J. and S. Natnar Sundaram, J.*,

The Management of M/s. Antiseptic (Journal) 323/326, Thambu Chetty Street, Madras .. *Appellant**

v.

A. Gangadharan and another .. *Respondents.*

A) Employees' Provident Fund and Miscellaneous Provisions Act (XIX 1952) prior to amendment by Act XCIX of 1976), section 19-A—Applicability—Office establishment and Printing press of M/s. Antiseptic whether two different separate establishments.

(B) Constitution of India (1950) *Article* 226—*High Court's power to sit as a Court of appeal.*

Held:—As observed by the Supreme Court in *Associated Cement Companies* v. *Their Workmen*, 1960 S.C.J. 1165: (1960) 1 S.C.R. 703, the real purpose of the test must be to find out the true relation between the parties, branches, units etc., and if in their true relation they constitute one integrated whole, then it must be held that the establishments are one. But on the contrary if they do not constitute one integrated whole, then each unit must be held to be an independent and a separate one. [*Para.* 7.]

In this case, the following factual features are admitted; (*i*) Both the Press and the Publication are owned by the same firm; (*ii*) the control and supervision of both the units are by one and the same agency, may be by different partners; (*iii*) regarding finance, the bank account is one and the tax assessments are common; (*iv*) in the press, no outside job is undertaken; (*v*) only to cater to the needs of the publication and to serve its cause, the press was started; (*vi*) the maintenance of the press as well as the publication is from and out of the subscription and advertisement revenue from the publication; and (*vii*) the press cannot be carried on but for the publication and the needs of the publication with regard to printing are being fulfilled by the press The factual features clinchingly establish the financial, managerial and functional integrality between the two units and they constitute one integrated whole.

[*Para.* 8.]

The major features with regard to financial, managerial and functional integrality besides a common ownership having been established they clinch the issue. The purpose must be to find out the true relation between the two units as to whether they constitute one integral whole. Unless there are other clinching factual features which completely militate against the integrality, financially, managerially and functionally, besides common ownership, the conclusion is inescapable that the two units constitute one and the same establishment.

[*Para.* 9.]

It is now well-settled that in a proceeding under Article 226 of the Constitution of India, this Court is not supposed to sit as a Court of appeal over the findings of fact recorded by the concerned inferior tribunal to re-assess and re-appreciate the factual materials or to correct purely an error of fact not leading to an error of jurisdiction. There cannot be the issuance of a writ on the mere ground that the decision rendered by the inferior tribunal is erroneous on facts from the point of view of the High Court. But that does not mean that the High Court under Article 226 of the Constitution of India, has no power to determine as to how far the provisions of a particular statute would or would not apply to an admitted set of facts It has also been recognised that the High Court can examine the jurisdictional facts. But, even this examination has got its own limitations. There is no need to go into the ambit of the power of the High Court to examine the jurisdictional facts, because it does not strictly arise in this particular case. If on admitted facts, by the application of the well-accepted principles a particular legal consequence should follow and if there is an omission on the part of the inferior Tribunal to adhere to the process and reach the ultimate conclusion in law, then the High Court is not powerless to come to the rescue of the party who is put to prejudice by the order of the inferior tribunal. [*Para.* 4]

* W.A. No, 291 of 1978. 28*th February*, 1984.

Cases referred to:—

Indian Cable Company Ltd. v. *Its Workmen* (1962) 1 L.L.J. 409; *Mettur Motors (P) Ltd.* v. *Regional Provident Fund Commissioner*, A.I.R. 1959 Punj. 89; *Andal and Company* v. *Regional Provident Fund Commissioner*, I.L.R. (1965) 2 Mad. 302; *Associated Cement Companies* v. *Their Workmen*, 1960 S.C.J. 1165: (1960) 1 S.C.R. 703: A.I.R. 1960 S.C. 56.

Appeal under Clause 15 of the Letters Patent against the order of Mr. Justice Ramanujam dated 13th June, 1977, and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 1972 of 1973 presented under Article 226 of the Constitution of India to issue a writ of *certiorari*; calling for the records on the file of the 1st respondent relating to order bearing No. 5159166-PF-11 dated 15th September, 1972 and to quash the order of the respondent bearing No. 5159166 PF-11 dated 15th September, 1972.

K. Ramagopal, for Appellant.

A.L. Somayaji of *Aiyar* and *Dolia*, for 1st Respondent.

T. Somasundaram, Addl. Central Government Standing Counsel, for 2nd Respondent.

The Judgment of the Court was delivered by

Nainar Sundaram, J.—The second respondent in W.P. No. 1972 of 1973 is the appellant in this writ appeal. The first respondent herein is the petitioner and the second respondent herein is the first respondent in the writ petition. For the sake of convenience, we shall refer to the parties as per their appellations in the writ petition. The writ petition was filed to quash the order of the first respondent dated 15th September, 1972, passed under section 19-A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, hereinafter referred to as the Act, the same bearing the nomen clature of the Employees Provident Funds and Family Pension Fund Act, 1952 prior to its amendment by Act 99 of 1976. The writ petition came to be filed for the above relief in the following circumstances. The second respondent as a firm was carrying on the business of publication of two medical journals "Antiseptic" and "Health" at premises No. 323-324, Thambu Chetty Street, Madras-1 even from the year 1904. The said establishment shall hereinafter be referred to as the publication; In 1932, the same firm established a printing press under the name and style of "Antiseptic Press" at No. 10, Thambu Chetty Street, Madras-1 and it shall hereinafter be referred to as the press. There is no difficulty with regard to the press and it has been brought within the mischief of the Act. Admittedly, there was a move by the concerned employees of the publication to have the same brought within the mischief of the Act on the ground that both the press and the publication are integrated and inseparable units. Ultimately the matter went before the first respondent and by order dated 29th July, 1965, the first respondent held that the press and the publication are different establishments. The order of the first respondent was challenged in W.P, No, 603 of 1966 and this Court allowed the writ petition and directed the first respondent to examine the matter and dispose of the same after hearing the employees. Once again the first respondent examined the matter and by order dated 11th September, 1969, held that the press and the publication are separate establishments; The matter was again brought to this Court in W.P. No. 1023 of 1970 and this Court was obliged to quash the said order on the ground that no reasons were expressed and the order was a non-speaking order. The matter again went back to the first respondent and the first respondent passed the present impugned order, addressed to the President of the Antiseptic Employees' Union and the text of the said order runs as follows:—

"With reference to your letter dated the 11th August, 1971, on the above subject, I am directed to say that the Central Government, in pursuance of the orders of the High Court of Madras, has carefully considered the entire matter. The representatives of the Management and the Employee's Union of M/s. Antiseptic, Madras, have also been given a hearing and the Central Government finds that:—

1. M/s. Antiseptic, Madras are publishing medical journals 'Antiseptic' and

'Health'; and in pursuance thereof they have set up their own press. The Journals are printed in that press and thereafter published from the office. The press has been covered under the provisions of the Employees' Provident Funds and Family Pension Fund Act, 1952 under the head printing'.

2. The press and the office are located in different premises and are registered under different enactments.

3. There are two separate unions for the press and the office workers. This has been admitted by Shri Gangadharan, Secretary of the Union.

4. No outside job is undertaken by the press. This fact has also been admitted bv Shri Gangadharan, Secretary of the Union. The learned counsel for the Union has also conceded that the file of M/s. Antiseptic is not engaged in printing in general.

5. The mere fact that there might be unity of finance, management and functional integrality between the two units would not result in the coverage of the office also.

6. The primary activity of M/s. Antiseptic is the publication of medical journals, *viz.*, 'Antiseptic' and 'Health' and not printing.

7. The office is not an adjunct of the printing press.

"2. In view of the foregoing, the Central Government has come to the conclusion that the office establishment and the printing press of M/s. Antiseptic are two separate establishments. The publishing house cannot be considered as a part of the printing press and therefore, the office is not liable to be covered under the Employee's Provident Funds and Family Pension Fund Act, 1952. The press would, however, continue to be covered under the said Act. The Central Government hereby directs accordingly under section 19-A of the said Act.

"By order and in the name of the President".

2. Ramanujam, J., who heard the writ petition, after tracing the preceding facts, assessed the matter in the light of the pronouncement of courts, including this court as well as the highest court in the land. In conclusion, the learned judge held that the financial, managerial and functional integrality of the two units has been established and in view of that, the decision of the first respondent that the press and the publication are two independent units cannot be sustained. The learned judge allowed the writ petition. However. the question as to which of the two activities is the main activity for the purposes of the application of the Act was left open by the learned judge. The writ appeal is directed against the order of the learned judge.

3. Mr. K. Ramagopal, learned counsel for the second respondent, (the appellant herein) would advance two submissions coveting interference in writ appeal. One is that it is entirely within the jurisdiction of the first respondent, (the second respondent herein) to decide the matter under section 19-A of the Act and when such a decision has been rendered by the first respondent on an appraisal of the factual aspects, this Court, in writ jurisdiction, shall not constitute itself into an appellate court to re-examine the matter once again from the factual angle and render a different decision. The second submission of the learned counsel is that even otherwise the tests well accepted by the judicial precedents to find out the integrality or otherwise of the two units, if properly applied, could lead only to one answer and that is, the two units are independent and separate. We shall now examine these contentions.

4. Regarding the first connection, we can take it that it is now well settled that in a proceeding under Article 226 of the Constitution of India, this court is not supposed to sit as a Court of Appeal over the findings of fact recorded by the concerned inferior Tribunal to re-assess and re-appreciate the factual materials or to correct purely an error of fact not leading to an error of jurisdiction. There cannot be the issuance of a writ on the mere ground that the decision rendered by the inferior Tribunal is erroneous on facts from the point of view of this Court. But that does not mean that this Court, under Article 226 of the Constitution of India, hos no power to determine as to how far the provisions of a particular statute

would or would not apply to the admitted set of facts. It has also been recognised that this Court can examine the jurisdictional fact But even this examination has got its own limitations. There is no need to go into the ambit of the power of this Court to examine jurisdictional facts, because it does not strictly arise in the present case. If on admitted facts, by the application of the well accepted principles a particular legal consequence should follow and if there is an omission on the part of the inferior Tribunal to adhere to the process and reach the stultimate conclusion in law then, this Court is not powerless to come to the rescue of the party who is put to prejudice by the order of the inferior Tribunal.

5. The decision under section 19-A of the Act is not immune to review by this Court if there had been a violation of the principles governing the same. The point in issue in the present case is as to whether the two units, namely, the press and the publication from one integral unit or they are independent and separate. If the position is the first one, the publication, along with the press, will come within the mischief of the Act. If the position is the latter one, the publication will go outside the Act. That it is the first respondent who should decide the matter is not being disputed before us. In *Indian Cable Cow. Ltd* v *Its Workmen*[1] the Supreme Court opined that the question whether a branch or a department is in itself an industrial establishment within the meaning of section 25-G of the Industrial Disputes Act, 1947, is a mixed one of fact and law. In *Mettur Motors (Pri) Ltd.* v. *R.P.F, Commr.*[2], a Bench of the Punjab High Court, consisting of Bhandari, C.J., and Dulrt, J., observed that even if the view of the Central Government under section 19-A of the Act were to be against a party and his contentions, yet, he would still be entitled to have the decision examined by the High Court, if the decision is to turn on the interpretation of the Act itself.

6. In *Andal & Company* v. *Regional Provident Fund Commissioner*[3] Srinivasan, J., held that the finality given to the order of the Central Government by section 19-A of the Act cannot stand in the way of this Court examining the order in the exercise of its writ jurisdiction and this Court, in the exercise of its jurisdiction, can enter into the examination of the question whether the Act is applicable to the particular factory or establishment and resolve any matters of doubt that may exist even upon the five heads mentioned in section 19-A of the Act. The exposition of the above proposition which countenances the jurisdiction of the Court to examine the propriety or otherwise of the decision of the Central Government under section 19-A of the Act necessarily leads to the other question as to whether the first respondent ignored the well accepted principles to find out the integrality or otherwise of the two units, so as to make both come within the mischief of the Act,

1. (1962) 1 L.L.J. 409.
2. A.I.R. 1959 Punj. 89
3. I.L.R. (1965) 2 Mad. 332.

7. In *Associated Cement Compants* v. *Their Workmen*[1] while examining the question as to when two units owned by the same company would become parts of the establishment for the purposes of the Industrial Disputes Act, 1947, the Supreme Court summed up the position as follows:—

"The Act not having prescribed any specific tests for determining what is 'one establishment', we must fall back on such considerations as in the ordinary industrial or business sense determine the unity of an industrial establishment, having regard no doubt to the scheme and object of the Act and other relevant provisions of the Mines Act, 1952, or the Factories Act, 1948, What then is 'one establishment' in the ordinary industrial or business sense? The qnestion of unity or oneness presents difficulties when the industrial establishment consists of parts, units, departments, branches, etc. If it is stricitly unitary in the sense of having one location and one unit only, there is little difficulty in saying that it is one establishment. Where. however, the industrial undertaking has parts, branches, departments, units, etc., with different locations, near or distant, the question arises what tests should be applied for determining what constitutes 'one establishment'. Several tests were referred to in the course of arguments, before us, such as, geographical proximity, unity of ownership, management and control, unity of employment and conditions of service, functional

1. (1960) 1 S.C.R. 703; 1960 S.C.J. 1166: A.I.R. 1960 S.C. 56,

integrality, general unity of purpose etc. To most of these we have referred while summarising the evidence of Mr. Dongray and the findings of the Tribunal thereon. It is, perhaps, impossible to lay down any one test as an absolute and invariable test for all cases. The real purpose of these tests is to find out the true relation between the parts, branches, units, etc. If in their true relation they constitute one integrated whole, we say that the establishment is one, if on the contrary they do not constitute one integrated whole, each unit is then a separate unit. How the relation between the units will be judged must depend on the facts proved, having regard to the scheme and object of the statute which gives the right of unemployment compensation and also prescribes disqualification therefor. Thus, in one case the unity of ownership, management and control may be the important test, in another case functional integrality or general unity may be the important test; and in still another case, the important test may be the unity of employment. Indeed, in a large number of cases several tests may fall for consideration at the same time. The difficulty of applying these tests arises because of the complexities of modern industrial organisation; many enterprises may have functional integrality between factories which are separately owned; some may be integrated in part with units or factories having the same ownership and in part with factories or plants which are independently owned. In the midst of all these complexities it may be difficult to discover the real threed of unity."

As observed in the above decision, the real purpose of the test must be to find out the true relation between the parts, branches, units etc., and if in their true relation they constitute one integrated whole, then it must be held that the establishment is one. But, on the contrary, if they do not constitute one integrated whole, then each unit must be held to be independent and a separate one.

8. The following factual features are admitted: (*i*) Both the press and the publication are owned by the same firm; (*ii*) the control and supervision of both the units are by one and the same agency, may be by different partners; (*iii*) regarding finance, the bank account is one; and the tax assessments are common (*vi*) in the press, no outside job is undertaken; (*v*) only to cater to the needs of the publication and to serve its cause, the press was started; (*vi*) the maintenance of the press as well as the publication is from and out of the subscription and advertisement revenue from the publication; and (*vii*) the press cannot be carried on but for the publication and the needs of the publication with regard to printing are being fulfilled by the press. In our view, as held by the learned judge, these factual features clinchingly establish the financial, managerial and functional integrality between the two units and they constitute one integrated whole.

9. Coming to the factors that have been mainly taken note of by the first respondent to hold that the Press and the publieation are independent units, they are; the location of the two units; their registration under different statutes, (the Press, under the Factories Act and the publication, under Tamil Nadu Shops and Establishments Act); and the existence of two separate unions, one for the employees of the press and one for the employees of the publication. It is also urged before us that employees of the two units stand on separate muster rolls; the wage structures are different; and there is no element of tranferability from one unit to another. As rightly held by the learned judge, these features are not of much consequence and the major feature with regard to financial, managerial, and functional integrality besides common ownership having been established, they clinch the issue and we have to hold that the first respondent has not appreciated and applied the correct principles to the admitted facts and has not drawn the invariable conclusion in law. The purpose must be to find out the true relation between the two units, as to whether they constitute one integral whole. Unless there are other clinchlng factual features which completely militate against this integrality, financially, managerially and functionally, besiders common ownership the conclusion is inescapable that the two units constitute one and the same establishment. The first respondent did find as a matter of fact that

there is financial, managerial and functional integrality between the two units. Yet, the first respondent chose to ignore these crucial features, taking note of other features, which are not very germane on the facts of the present case. The other features taken note of by the first respondent are likely to be there even when the same establishment is to man two or more parts of its own and on the facts of the present case, they are not decisive.

10. The above discussion obliges us to dismiss the writ appeal and accordingly, the same is dismissed. There will be no order as to costs.

R. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESETT:—*V. Ratnam, J.*

Canara Bank. Thatiengarpet, represented by its Manager .. *Petitioner**

v.

Periasamy Muthuraja and anothor

.. *Respondents.*

Civil Procedure Code (V of 1908), Order 7 rule 10—Return of plaint for carrying out amendment even prior to admission of the plaint—Held not in order—Revision allowed.

V. Kunchithapatham, for Petitioner.

The Court made the following

ORDER:—The Court below was in error in directing the petitioner, even at a stage prior to the admission of the plaint, to amend the plaint regarding the claim made therein for interest. The petitioner has stated in paragraphs 4 and 6 of the plaint as to how it is entitled to claim a higher interest on the claim and also a higher rate of interest subsequent to the date of plaint till realisation. If the petitioner's claim in that regard is found to be in order, then it will be open to the Court to countenance such a claim and grant relief. Even if for some reason the Court finds that the claim of the petitioner for interest as made in the plaint is not allowable or otherwise sustainable, it would be open to the Court to refuse the petitioner that relief or give other appropriate relief which may be available to the petitioner under the law. Without doing so, the order of the Court below directing the return of the plaint for carrying out amendmients, even at a stage prior to the admission of the plaint, is not in order. That order is, therefore, set aside. The learned District Munsif, Turaiyur, is directed to take the plaint on his file, number the suit and proceed with the trial in the usual course. The Civil Revision Petition is allowed. There will be no order as tocosts.

R. S. *Petition allowed.*

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* C.R.P.No. 4170 of 1982 *26th October,* 1984.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:— *G. Ramanujam and V. Ratnam, JJ*

Life Insurance Corporation of India, rep. by the Chairman, Bombay and others *Appellants**

v.

Kalavathi B. Jawa. *Respondent.*

(*A*) *Life Insurance Corporation of India (Agents) Regulations, 1972, Regulation 9 (4)—Minimum business to be done by the ageut—Determination of—Whether with reference to "agency year" or "calendar year"*

(*B*) *Words and Phases—"Year"—Meaning of*

(*C*) *Interpretation of Statutes—Two expressions in the same rule—Not to construc both expessions to have the same meaning.*

The respondent was appointed as an agent of the Life Insurance Corporation of India with effect from 20th August, 1962. Under the terms of the appointment she had to do minimum amount of business of Rs. 1 lakh on the life of 12 different persons in a calendar year. On the ground that she had not completed the minimum amount of business as required her services were terminated as per regulation 13 (1) and she could not claim the benefit of regulation 9 (4) as she had not completed fifteen years of service. The agent filed a writ petition challenging the order terminating her services which was allowed. The Life Insurance Corporation filed an appeal against the judgment of the single Judge.

Held:—After a close perusal of the various sub-regulations it is not possible to read or construe the exprestion 15 years in regulation 9 (4) as 15 agency years Sub-regulations (1), (2) and (3) of regulation 9 use the expression "agency year" but regulation 9 (4) does not refer to "agency year" and it merely refers to "years", It is a well established rule of construction that when the rule-making authority uses two different expressions in the same rule as 'years' and 'agency year' it is not possible to construe both the expressions to have the same meaning. Further, regulation 9 (4) has got three sub-clauses and all the three sub-clauses use the expression "years". If 15 years occurring in clause (c) of sub-regulation (4) is to be understood as "agency year" then similar interpretation has to be given to clauses (*a*) and (*b*). If it is so done, regulation 9 (4) will not carry any proper meaning. A proper reading of sub-regulation (4) indicates that the expression "year" occurring therein has not been used with reference to 'agency years'. In this case the writ petitioner having been appointed with effect from 20th August, 1962, she has not completed 15 years of service as on 31st December, 1976. Therefore regulation 9 (4) has no application. It is only after the completion of 15 years of service from the date of appointment the writ petitioner can claim the benefit of regulation 9 (4), The writ petitioner is bound to secure a minimum business even in the 15th year of service and on any default to secure that business, the automatic termination clause contained in regulation 13 (1) will have to be applied. [*Para. 6*].

* W.A. No. 290 of 1980. 21st June, 1984.

Appeal under Clause 15 of the Letters Patent against the order of Mr. Justice Ramaswami, dated 21st Jaunary, 1980 and made in the exercise, of the Special Original Jurisdiction of the High Court in Writ Petition No, 2927 of 1977 presented under Article 226 of the Constitution of India, to issue a Writ of *Certiorari* calling for the records pertaining to the order of 3rd respondent dated 11th February, 1977 terminating the agency in favour of the petitioner (Code No. 9357722) and the further letter of the 3rd respondent, dated 14th April, 77 and quash the same.

The Judgment of the Court was delivered by

Ramanujam, J.—This writ appeal is directed against the order of V. Ramaswami, J. allowing Writ Petition No. 2927 of 1977 filed by the respondent, and it involves the iuterpretation of regulation 9 (4) of the Life Insurance Corporation of India (Agents) Regulations, 1972, hereinafter referred to as the Regulations.

2. The respondent herein was appointed as an agent of the Life Insurance Corporation of India by an order, dated 7th September, 1962 with effect from 20th August, 1962. Under

the terms of the appointment she has to do a minimum amount of business of Rs. 1 lakh on the life of 12 different persons in a calendar year. On the ground that she had not completed a minimum amount of business as required, she was informed by a letter, dated 11th February, 1977, that her services stood terminated under regulations 13 (1). The respondent therefore filed Writ Petition No. 2927 of 1977 seeking to quash the said commnnication, dated 11th February, 1977 mainly on two grounds viz., (1) according to the terms of the contract and regulation 9 she is bound to do the minimum business not in a calendar year but in an "agency year" ending with 20th August, since her services as an agent under the appellants commenced on and from 20th August, 1962, and if the agency year ending with 20th August is taken as the basis for fixing the minimum business, then she had done the minimum business between 20th August, 1976 and 19th August, 1977 and (2) since she has completed 15 years of service, she is not obliged to do the minimum busines as contemplated in regulation 9 (1) in view of regulation 9 (4).

3. The appellants resisted the writ petition contending that the minimum business to be done by the writ petitioner has to be determined withreference to the calendar year ending 31st December, 1976 and not with reference to the "agency year" ending with 20th August, 1977 and admittedly the writ petitioner has not done the minimum business during the calendar year ending 31st December, 1976 and the writ petitioner has not completed 15 years of service so as to claim the benefit of Regulation 9 (4). Thus the controversy between the parties was as to whether the minimum business to be done by the writ petitioner is to be determined with reference to the agency year' as contended by the writ petitioner or with reference to the 'calendar year' as contended by the Life Insurance Corporation and whether the writ petitioner has completed 15 years of service so as to enable her to claim the benefit of Regulation 9 (4).

4. So far as the first question is concerned, the learned single Judge has held that it is the calendar year that is material for the purpose of determining minimum business and nto the agency year as claimed by the writ petitioner. That finding which is in favour of the Life Insurance Corporation has not been challenged before us by the writ petitioner, the respondent in this appeal. Even otherwise, we are in entire agreement with the learned Judge when he says that in relation to the writ petitioner, it is the calendar year that will apply and not the agency year. The definition of "agency" in regulation 3 (*c*) clearly indicates that so far as the writ petitioner is concerned, who comes within the definition of "absorbed agent" as defined in regulation 3 (*a*), she is governed by only calender year and not the agency year.

5. Now coming to the second question which alone has been decided against the Lise Insurance Corporation of India by the learned Judge, the learned Judge interpreted the expression "year" occurring in Regulation 9 (4) as meaning "agency year". Regulation 9 (1) provides for a minimum amount of business to be secured by an agent other than absorbed agent. Regulation 9 (2) provides for the minimum business to be secured by such agent in the second or subsequent agency years. Regulation 9 (3) (a) provides for a minimum business to be secured by an absorbed agent in the first agency year and Regulation 9 (3) (*b*) to (*d*) provides for the minimum amout of business to be secured by an absorbed agent in the second, third and subsequent years respectively. Regulation 9 (4) which is material in this case is follows:—

> "Notwithstanding anything contained in sub-regulation (2) or sub-regulation (3), an agent will be exempt from bringing in the business required of him under the said sub-regulation if he has continuously worked for the Corporation as an agent for a period of:
>
> (*a*) not less than 21 years; or
>
> (*b*) at least fifteen years and he is at least 55 years of age; or
>
> (*c*) fifteen years and at any time subsequent thereto there is business in force in the books of the Corporation under his

agency yielding a renewal premium income of not less than Rs. 40,000/- per annum."

The said Regulation 9 (4) says that notwithstanding the minimum amount of business provided in sub-regulations 2 or 3, an agent shall be exempt from bringing in the business required of him under the said sub-regulation if he has continually worked for the Corporation as an agent for a period of or (*a*) not less than 21 years, or (*b*) at least fifteen years and he is at least 55 years age, of (*c*) fifteen years and the business secured by him so far is yielding a renewal premium of Rs. 40,000/- per annum There is no dispute that the business secured by her so far is yielding a renewal premium income of Rs. 40,000/-per annum. The controversy between the parties is as to whether the writ petitioner has completed 15 years of service as contemplated by Regulation 9 (4) (*c*).

6. Admittedly the writ petitioner was appointed with effect from 20th October, 1962. Normally she will be completing 15 years of service only on 19th August, 1977 and, therefore on 31st December, 1976, the end of the calendar year 1976, she would not have completed 15 years of service. However, the learned Judge has construed the expression "15 years" occurring in Regulation. 9 (4) (*c*) as 15 agency years and on that basis he has held that the writ petitioner does not come within the mischief of Regulation 13 (1) dealing with automatic termination of agency. Regulation 13 (1) is as follows:—

> "If an agent fails to bring in the business required of him under Regulation 9 in an agency year, his appointmemt shall stand terminated at the end of such agency year. Provided that nothing contained herein shall apply to an agent who has been exempted under sub-regulation 9 from bringing in the minimum business required under the said regulation."

Thus this regulation will not apply in a case where an agent fails within Regulation 9 (4). After a close perusal of the various sub-regulations of regulation 9, we are of the view that it is not possible to read or construe the expression "15 years" as "15 agency years" as has been interpreted by the learned Judge. Sub-regulations (1), (2) and (3) of Regulation 9 use the expression "agency year" but Regulation 9 (4) does not refer to "agency year" and it merely refers to 'year'. It is a well-established rule of construction that when the rule-making authority uses two different expressions in the same rule such as 'year' and 'agency year' it is not possible to construe both the expressions to have the same meaning. Further, regulation 9 (4) has got three sub-clauses and all the three sub-clause use the expression "years". If 15 years occurring in clause (*c*) of sub regulation (4) is to be understood as "agency year" then similar interpretation has to be given to clauses (*a*) and (*b*). If it is so done, regulation 9 (4) will not convey any proper meaning A proper reading of sub-regulation (4)indicates that the expression "years" occurring therein has not been used with reference to 'agency year'. As already stated sub-regulations (1) to (3) of Regulation 9 specifically use the expression "agency years" In this case the writ petitioner having been appointed with effect from 20th August, 1962, she has not completed 15 years of service as on 31st December, 1976 Therefore regulation 9 (4) has no application. The learned Judge has also observed that not securing the minimum business for the fifteenth agency year will not result in automatic termination of the agency under regulation 13 (1) but it can be taken only as a ground for taking agency. We are of the view that it is only after the completion of 15 years of service from the date of appointment the writ petitioner can claim the benefit of regulation 9 (4) and that the writ petitioner is bound to secure a minimum business even in the 15th year of service; on any default to secure that business, the automatic termination clause contained in regulation 13 (1) will have to be applied. As we disagree with the view expressed by the learned Judge that the writ petitioner has completed 15 years of service within the meaning of regulation 9 (4), we have to hold that the writ petitioner is not entitled to the benefit of regulation 9 (4) and therefore, the writ petitioner has to secure the minimum business under regulation 9 (3) and her inability to secure the minimum business as per regulation 9 (3) will call for the application of regulation 13 (1) dealing with automatic termination of agency.

7. In view of what has been stated above, the writ appeal is allowed and the writ petition will stand dismirsed There will, however, be no order as to costs.

R.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*S. Mohan and S. Swamikkannu, JJ.*

R.D. Kubchandani .. *Appellant**

v.

M/s. Indo Mercantile Fund Private Ltd., rep. by Official Liquidator, Madras and others. .. *Respondents*

(*A*) *Companies Act (I of 1956) section 458-A; Tamil Nadu Chit Funds Act (XXIV of* 1961), *section* 25—*Reference to old Limitation Act* IX of 1908—*No reference to new Limitation Act (XXXVI of 1963)—Which Act to prevail whether the old Act or the new Act*

(*B*) *General Clauses Act (X of 1897), section* 8—'*Unless different intention appears*'—*Meaning of*

(*C*) *Statute—Interpretation—Special Act prevails over General Act.*

A suit was filed on foot of a promissory note dated 20th September, 1968, executed in favour of a Chit Fund: The last payment made by the appellant towards the promissory note was on 19th December, 1968. The application for winding up the Fund was filed on 21st January, 1970. The order of winding up was passed on 10th April, 1970. The present suit forming the subject-matter of appeal came to be filed on 8th December, 1972. Reckoning three years period from 19th December, 1968 would mean the suit ought to have been filed on or before 18th December, 1971. If as per the section, a period of three months plus the number of days commeucing from 21st Jaunary, 1970 to 10th April, 1970 are added on, the suit as filed on 3rd December, 1972 is beyond time. The question is which of the periods has to be applied. One thing cannot be gainsaid. There is no provision in the old Limitation Act of 1908 corresponding to section 15 (3) of the new Limitation Act 1963. Under those circumstances, when section 458-A of the Companies Act states 'notwithstanding the Indian Limitatation Act, 1908' two important aspects flow. Firstly, this non-obstante clause must be given its full effect. Secondly, when it refers to the Indian Limitation Act, 1908, it means only the law on the subject. In other words section 458 A of the Companies Act must be construed as having overriding effect over the Limitation Act. That is the purport of non-obstante clause. As to what prompted the incorporation of such a provision can be gathered from the report of the Law Commission and from the statement of objects and reasons. [*Para.* 9]

But the new Limitation Act of 1963 repeals under section 32 as it originally stood, the Indian Limitation Act, 1908. That is why it is stated, the Indian Limitation Act, 1908 is hereby repealed. This repeal itself was however repealed by Act 56 of 1974. Section 15 (3) of the Limitation Act of 1963 talks of computation of limitation for any suit or application by any receiver or interim receiver appointed, in proceedings for the adjudication of a person as an insolvent or by a liquidator or provisional liquidator. Therefore, it has got a wide scope of application in that even cases of insolvency are contemplated. [*Para.* 9]

Therefore when the Companies Act under section 458-A incorporates by reference the provisions of the Indian Limitation Act, 1908 a repeal of that Limitation Act, does not affect the Companies Act or the provisions incorporated. In this case, there is no question of incorporation of a provision. It has obviously referred to the law on the subject viz., the Indian Limitation Act 1908. If it is so construed, section 458-A of the Companiee Act will have to prevail over the Limitation Act of 1963. [*Para.* 9]

This is besides the question that the Companies Act is a special Act while the Limitation Act is a general Act. In such a case, it is only the special Act that will prevail.

Cases referred to:—

C.A. Durgachalam v. *Jannet Chit Fund (P) Ltd.*, (1977) 90 L.W. 565; *Mohd., Usman* v. *Union of India*, (1969) 1 S.C.J 780: (1969) 2 S.C.R. 232: A.I.R. 1969 S.C., 474; *Chellaperumal Chetti* v. *Jayarathnam Chettiar*, (1960) 1 M.L.J. 237: 73 L.W. 233: A.I.R. 1960 Mad. 314; *Ram Sarup* v. *Munshi*, (1963) 3 S.C.R. 858: A.I.R. 1963

*A.S. No. 149 of 1978. 12th July 1984.

S.C. 553; *Clarke* v. *Bradlaugh*, (1881) 8 Q.B.D., 63; *Bajya* v. *Gopikabai*, (1978) 2 S.C.C. 542: A.I.R. 1978 S.C. 793.

U.N.R. Rao, for Appellant.

G. Viswanathan for Respondents.

The Judgment of the Court was delivered by

Mohan, J.—The first defendant is the appellant before us. The appeal arises out of O.S. No. 9862 of 1972 on the file of the learned III Assistant Judge, City Civil Court, Madras. The said suit was filed on the foot of a promissory note, The plaint allegations are as follows. The first defendant was subscribing to a monthly chit, the total amount of which was Rs. 30,000/- in M/s. Indo Mercantile Fund (P) Ltd., which went into liquidation and he got the bid amount of Rs: 19,500/- in the first auction held on 17th August, 1968. He along with defendants 2 to 4 as sureties executed in favour of the plaintiff on 20th September, 1968 a promissory note for Rs. 29,000/- agreeing to pay interest at 12 per cent per annum in consideration of the bid amount paid to the 1st defendant on 19th October, 1968 by cash. The first defendant has paid a total amount of Rs. 1,900/- till 19th December, 1968 and during the period ending with 19th December, 1968 the dividend declared amounted to Rs. 600/- In all a sum of Rs. 2,500/- has to be credited towards his account. The first defendant is therefore liable to pay the balance of Rs 27, 500/- and interest of Rs. 13, 062.50 from 20th December, 1968 to the date of plaint, amounting in all to Rs. 40,562.50. Defendants 2 to 4 are also liable to pay the said amount. The defendants in spite of repeated demands have failed to do so and therefore the suit is filed for directing the defendants 1 to 4 to pay the plaintiff a sum of Rs 40.562.50 with interest at 6 per cent per annum on Rs. 27,500/- from the date of plaint till the date of recovery of the entire amount. The first defendant admitted that he has subscribed to a chit under the plaintiff for a total sum of Rs. 30,000/- and also he received a sum of Rs. 19,500/-. He equally admitted the execution of the promissory note for Rs. 29,000/-. on 20th September, 1968. There is a failure of consideration to the extent mentioned above. The first defendant was regular in his payment and would have continued to pay the instalments but for the facts that the conduct of the chit was wound up. If the plaintiff company had conducted the chit the first defendant would have been in a position to get dividend every month. Further, the suit is barred by limitation under section 458-A of the Companies Act and under section 25 of the Tamil Nadu Chit Funds Act. As regards the defence of the second defendant, it does not matter to us because the first defendaat alone is the appellant before us. Defendants 3 and 4 remained *ex parte*.

2. On these pleadings the following issues were framed for trial:

1. Whether there is partial failure of consideration for the pronote ?

2. Whether rhe claim is barred?

3. To what sum the plaintiff is entitled?

4. To what relief?

Additional Issues:

1. Did the 2nd defendant agree to pay interest?

2. Is the plaintiff entitled to interest from 20th December, 1968 till date of plaint?.

3. Is the suit sustainable on the suit promissory note?

4. Is the suretyship cancelled as stated in para 13 of the written statement of 2nd defendant?

5. Is the amount claimed correct?

On issues 1, 3 and additional issues 1 to 5, the learned City Civil Judge came to the conclusion that the liability to pay the amount is only under Ex.A-1, that there is no bar to enforce the liability under Ex. A-1, that Ex. A-1 is not for surety and as such all the defendants are liable to pay the suit amount claimed in the suit. In the result, he answered all the issues in favour of the plaintiff. On Issue No.2 viz., the limitation, he was of the view that section 458-A of the Companies Act, would apply because that is a special law. Further, he was also of the view that section 8 of the General Clauses Act lends snpport to his view. In the result, he decreed the suit as prayed for. Thus, the appeal.

3. Learned counsel for the appellant Mr.U.N.R. Rao though attempted to argue that there is a failure of consideration, ultimately he did not press the point in view

of the categoric ruling of this Court on identical issue in *C.A. Durgachalam* v. *Jannet Chit Fund (P) Ltd.*[1]

4. As regards limitation, learned counsel for the appellant argued that section 458-A of the Companies Act refers only to the old Limitation Act, 1908. It does not make even an oblique reference to the new Limitation Act, 1963. Under those circumstances, when the old Limitation Act of 1908 was repealed, it would follow that it is only the new Limitation Act of 1963, which is a later Act, that will prevail, in view of the fact that where on identical issues there are two Acts, it is the later Act that will prevail. It was further contended that section 8 of the General Clauses Act could have no application because that clearly states 'unless a different intention appears.' Here, the fact that there is a different intention under the new Limitation Act of 1963 is enough to hold that the later law will prevail. In support of his submission, reliance is placed on *Mohd. Usman* v. *Union of India*[2] Learned counsel also cites Vepa Sarathy on Interpretation of Statutes, second edition, pages 150 to 152.

5. For all these reasons, it is urged that the decree passed against the appellant is liable to be vacated.

6. Mr. Viswanathan, learned counsel for the Official Liquidator, in so far as the liability is concerned states that it is concluded by *C,A Durgachalam* v. *Jannet Chit Fund (P) Ltd.*[1] As regards, the question of limitation he submits that section 458-A of the Companies Act is a legislation which makes a reference to the old Limitation Act of 1908. Once the old Limitation Act of 1908 has been repealed and substituted by another Limitation Act, viz., the new Limitation Act of 1963, the effect of such a substitution will be to read into the later law. It is not a statute by incorporation, but it is a statute by reference. Therefore, whenever section 458-A of the Companies Act refers to the Limitation Act, it would mean the law on the subject and that particular Act. He cites G P. Singh's Interpretation of Statutes as well as section 8 of the General Clauses Act and contends that the principle laid in section 8 of the General Clauses Act will govern this case as well. Lastly, it is urged in any event the Companies Act being a special enactment that would apply over the general law of the Limitation Act.

1. (1977) 90 L.W. 565

2. (1969) 1 S.C.J. 780: (1969) 2 S.C.R. 232: A.I.R. 1969 S.C. 474.

7. Having regard to the above, the only questions that arise for our determination are:

1. Whether to the extent the appellant is paid Rs. 19,500/- there is a failure of consideration since the promissory note is for Rs. 29,000/-.

(2) Whether the suit is barred by limitation.

8. As regards the first of the questions, we do not have to dwell at length, excepting to make a reference to *C.A. Durgachalam* v. *Jnnet Chit Funds (P) Ltd.*[1] Under an identical situation the Division Bench of this Court held:

> "We are in agreement with the learned Judge, that, in the conspectus of events, the suit has to be adjudged on the basis that the plaintiff has come to court basing his relief on the promissory note executed by a person who took the prize chit and, in lieu thereof executed the promissory note for the payment of the future instalments, admittedly, payable, by him as a member of this scheme. Though a faint argument was made by the learned counsel for the appellant that the promissory note is not supported by consideration, we are unable to see any force in it because the amount for which the appellant executed the promissory note did represent the future instalments payable by him as on the date of execution. In any event, following the decision of this Court in *Chellaperumal Chetti* v. *Iayarathnam Chettiar*[2]. we are to hold that the promissory note is supported by consideration,"

9. As regards limitation only, it requires to be dealt with in great detail. Some important dates for this purpose are to be noted. The last payment made by the appellant towards Ex. A-1 is 19th December, 1968. The application for winding up was filed on 21st January, 1970. The order of winding up was passed on 10th April, 1970. The

1. (1977) 90 L.W. 565.

2. (1960) 1 M.L.J. 237: 73 L.W. 233: A.I.R. 1960 Mad. 314.

present suit forming the subject-matter of appeal came to be filed on 8th December, 1972. Reckoning three years period from 19th December, 1968 would mean the suit ought to have been filed on or before 18th December, 1971. Section 458-A of the Companies Act reads as follows:

> "Notwithstanding anything in the Indian Limitation Act, 1908, or in any other law for the time being in force, in computing the period of limitation prescribed for any suit or application in the name and on behalf of a company which is being wound up by orders of Court, the period from the date of commencement of the winding up of the Company to the date on which the winding up order is made (both inclusive) and a period of one year immediately following the date of the winding up order shall be excluded".

As against this, section 15(3) of the new Limitation Act of 1963 reads as follows:

> "In computing the period of limitation for any suit or application for execution of a decree by any receiver or interim receiver appointed in proceedings for the adjudication of a person as an insolvent or by any liquidator or provisional liquidator appointed in proceedings for the winding up of a company, the period beginning with the expiry of three months from the date of appointment of such receiver or liquidator, as the case may be, shall be excluded".

If as per the section, a period of three months plus the number of days commencing from 21st January, 1970 to 10th April, 1970 are added on, the suit as filed on 3rd December, 1972 is beyond time. We will now have to determine which of the periods has to be applied. One thtng cannot be gainsaid. There is no corresponding provision in the old Limitation Act of 1908 to section 15(3) of the new Limitations Act, 1963 which we have extracted above. Under those circumstances, when section 458-A of the Companies Act states 'notwithstanding anything in the Indian Limitation Act, 1908' two important atpccts flow. Firstly, this non-obstante clause must be given its full effect. When it refers to the Indian Limitation Act, 1908, it means only the law on the subject. The reason for our holding so will be very clear from the following. In other words, section 458-A of the Companies Act must be construed as having overriding effect over the Limitation Act. That is the purport of the non-obstante clause. As to what prompted the incorporation of such a provision can be gathered from the report of the Law Commission and from the statement of objects and reasons. The report of the Law Commission states:

> "It is common knowledge that by the time a receiver or liquidator is appointed in insolvency or the liquidation proceedings and the receiver or the liquidator after getting information about the assets and liabilities of the estate settles down to the task of realising the assets of the estate, claims in favour of such estate or company get barred to the detrimenr of the persons entitled to the benefit of the assets. To avoid this hardship, we think it just that in respect of suits on behalf of an insolvent or a company in liquidation the period between the date of the filing of the petition for adjudication or winding up and the appointment of receiver or liquidator and a period of three months thereafter (to enable him to acquaint himself with the affairs of estate) should be excluded in computing the period of limitation for suits by or on behalf of an insolvent's estate or the company. The benefit of this provision shall also ensure to any interim receiver or provisional Liquidator"

The Statement of Objects and Reasons to the new Limitation Act of 1963 reads as under:

> "Sub Clause (3) is new. It is common knowledge that by the time a receiver or a liquidator is appointed in insolvency or in liquidation proceedings and the receiver or liquidator after getting information about the assets and liabilities of the estate, claims in favour of sueh estate or company get barred to the detriment of the persons entitled to the benefit of the assets. To avoid this hardship the sub clause provides that the period between the filing of the petition for the winding up or adjudication and the appointment of the receiver (including interim receiver) or liquidator (including a provisional liquidator) and a period of three months thereafter (to enable

him to acquaint himself with the affairs of the estate) should be excluded".

To this extent, there is absolutely no quarrel. But the new Limitation Act of 1963 repeals under section 32 as it origionally stood, the Indian Limitation Act, 1908. That is why it is stated, the Indian Limitation Act, 1908 is hereby repealed. This repeal itself was however repealed by Act 56 of 1974. Section 15 (3) of the Limitation Act talks of computation of limitation for any suit or application by any receiver or interim receiver appointed, in proceedings for the adjudication of a person as an insolvent or by liquidator or provisional liquidator. Therefore, it has got a wide scope of application in that even cases of insolvency are contemplated. Section 8 of General Clauses Act, 1897 reads thus;

"8. *Construction of reference to repealed enactment*:—(1) Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals and re-enacts with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted"

Therefore, when the Companies Act under section 458-A incorporates by reference the provisions of the Indian Limitation Act, 1908 a repeal of that Limitation Act, does not affect the Companies Act or the provisions incorporated. In this case, there is no question of incorporation of a provision. It has obviously referred to the law on the subject viz., the Indian Limitation Act, 1908. If it is so construed, section 458-A of the Companies Act will have to prevail over the Limitation Act of 1963. The law on the subject has been succinctly laid down in G.P. Singh's 'Principles of Statutory Interpretation', third edition at page 219:

"Incorporation of earlier Act into later;

When an earlier Act or certain of its provisions are incorporated by reference into a later Act, the provisions so incorporated become part and parcel of the later Act as if they had been 'bodily transposed into it'. The effect of incorporation is admirably stated by Lord Esher. M.R: 'If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held. is to write those sections into the new Act as if they has been actually written in it with the pen, or printed in it. The result is to constitute the later Act along with the incorporated provisions of the earlier Act, an independent legislation which is not modified or repealed by a modification or repeal of the earlier Act. As observed by Brett, J: where a statute is incorporated, by reference, into a second statute, the repeal of the first statute by a third does not affect the second, To the same effect is the statement by Sir George Lowndes; It seems to be no less logical to hold that where certain provisions from an existing Act have been incorporated into a subsequent Act, no addition to the former Act, which is not expressly made applicable to the subsequent Act, can be deemed to be incorporated in it, at all events if it is possible for the subsequent Act to function effectually without the addition. Ordinarily if an Act is incorporated in a later Act, the intention is to incorporate the earlier Act, with all the amendments made in it up to the date of incorporation. The rule that the repeal or amendment of the Act which is incorporated by reference in a later Act is not applicable for purposes of the later Act is subject to qualifications and exceptions".

One case that may be usefully referred to in this connection is *Ham Sarup* v. *Munshi*[1] That was a case in which the Punjab Pre-emption Act, 1915 defined 'agricultural land' by reference to the definition of agricultural land as contained in the Punjab Alienation of Land Act, 1900. That Punjab Alienaation of Land Act, 1900 was repealed by the Adaptation of Laws (Third Amendment) Order, 1951, The Supreme Court held that the repeal of the Punjab Alienation of Land Act, 1900, had no effect on the continued operation of the Pre-emption Act and this expression 'agricultural land' in the later Act had to be read as if the definition in the Alienation of Land Act had been bodily transposed into it. The Supreme Court observed as follows (*at page* 560)

"The problem here raised is dependent upon the construction which the several

1. (1963) 3 S.C.R. 858: A.I.R. 1963 S.C. 553.

provisions which we have set out earlier would bear after the repeal of the Punjab Alienation of Land Act, 1900. One thing is clear and that is that the authority which enacted the repeal of the Punjab Alienation of Land Act did not consider that Punjab Act 1 of 1913 had itself to be repealed. We shall now consider the effect of the repeal of the Punjab Alienation of Land Act with reference to each of the provisions:—(1) Definition of 'agricultural land' under S. 3 (1):—

Where the provisions of an Act are incorporated by reference in a later Act, the repeal of the earlier Act has, in general, no effect upon the construction or effect on the Act in which its provisions have been incorporated. The effect of incorporation is stated by Brett L.J. in *Clarke* v. *Bradlaugh*[1].

> 'Where a statute is incorporated by reference, into a second statute the repeal of the first statute by a third does not affect the second.'

In the circumstances, therefore, the repeal of the Punjab Alienation of Land Act of 1900 has no effect on the continued operation of the Pre-emption Act and the expression agricultural land in the later Act has to be read as if the definition in the Alienation of Land Act had been bodily transposed into it."

In *Bajya* v. *Gopikabai*[2] the following observations which are apt for our case is found.

> "Broadly speaking, legislation by referential incorporation falls in two categories. First, where a statute by specific reference incorporates the provisions of another statute as of the time of adoption, Second, where a statute incorporates by general reference the law concerning a particular subject as a *genus*. In the case of the former, the subsequent amendments made in the referred statute cannot automatically be read into the adopting statute. In the case of the latter category, it may be presumed that the legislative intent was to include all the subsequeut amendments, also, made from time to time in the generic law on the subject adopted by general reference. This principle of construction of a reference statute has been neatly summed up by Sutherland, thus:
>
> 'A statute-which refers to the law of a subject generally adopts the law on the subject as of the time the law is invoked. This will include all the amendments and modifications of the law subsequent to the time the reference statute was enacted (vide Sutherland's Statutory Construction, Third Edition, Corpus Juris Secondum p. 5208 also enunciates the same principles in these terms:
>
> Where the reference in an adopting statute is to the law generally which governs the particular subject, and not to any specific statute or part thereof, ...the reference will be held to include the law as it stands at the time it is sought to be applied with all the changes made from time to time, at least as far as the changes are consistent with the purpose of the adopting statute."

Therefore, construed in the way that we have done, we are unable to accept the argument of Mr. U.N.R. Rao, who emphasised that it is the later law that will prevail. In this case, we do not find any contrary intention. once the non-obstante clause is given its full scope and application *Mohd. Usman* v. *Union of India*[1] will equally not be applicable in view of the above reasoning.

10. This is besides the question that the Companies Act is a special Act while the Limitation Act is a general Act. In such a case, it is only the special Act that will prevail.

11. For all these reasons, we have no hesitation in upholding the judgment and decree of the trial Court. The appeal will be dismissed with costs.

12. The learned counsel for the appellant, after we pronounced the judgment, prays for leave to appeal to the Supreme Court. We do not think that this is a fit case for the grant of leave since we have decided the case only with reference to the Supreme

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1. (1881) 8 Q.B.D. 63.

2. (1978) 2 S.C.C. 542: A.I.R. 1978 S.C. 793.

1. (1969) 1 S.C.J. 780: (1969) 2 S.C.R. 232: A.I.R. 1969 S.C. 474.

Court Rulings arising under section 8 of the General Clauses Act, Hence, leave is refused.

R.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ratnam, J.*

Mrs. Elizabeth Antony .. *Petitioner**

v.

M.C.G.C. Loagmore .. *Respondent.*

(A) *Tamil Nadu Civil Courts Act (III of 1873), section 29 (1)—Notification—Jurisdiction of the Subordinate Judge and the District Judge, to entertain proceedings of contentious nature arising under Indian Succession Act for grant of Probate or Letters of Administration—Jurisdiction concurrent.*

(B) *Succession Act (XXXIX of 1925), section 211 (i)—Petition for grant of Probate—Scope—Opposition to the grant by lodging a caveat—Caveator claiming to be an executor under an unprobated will—Whether entitled to oppose the proceedings—Scope of proceedings for grant of Probate or Letters of Administrator—Explained*

Section 2 (*b*) of the Indian Succession Act defines the term "District Judge" as meaning the judge of principal Civil Court of original jurisdiction. Under section 265 of the Act, provision is made for the appointment of judicial officers within the district as the High Court may think fit to act for the District Judge as Delegates to grant probate and letters of administration in non-contentious cases. Under section 264 of the Act, Jurisdiction is conferred on the District judge to grant or revoke a probate or letters of administration. There is also a restriction in the powers of the District Delegate in that the District Delegate can grant probate or letters of administration only when the deceased at the time of his death had a fixed abode. The powers of the District Judge on this matter are wider in that the District Judge can grant probate or letters of administration where the deceased at the time of his death had a fixed abode or where any movable or immovable properties are situate within his jurisdiction. Non-contentious cases can ordinarily be disposed of by the District Delegate under the provisions of the Act but when once a contest is raised under section 288 of the Act; the matter has got to be returned for presentation to the District Judge. An application for revocation of a grant in a non-contentious proceeding cannot ordinarily be decided by the District Delegate as the filing of the application for the revocation itself would raise a contest. The non-contentious matter can always be referred by the delegate to the District Judge. In addition, there is also a difference even on the question of the conclusiveness of a grant made by the District Delegate and the District Judge. The conferment of such limited jurisdiction on the District Delegate was not something peculiar under the provisions of the Act only, for, even in the earlier enactments, the difference in the scope of the jurisdictinn of the Delegate and the District Judge had been maintained. This led to large scale accumulation of work in the District Court and in turn legislation in several States was passed with a view to enable the High Court to authorise any Subordinate Judge or even Munsif to take cognizance of, or any District Judge to transfer to a Subordinate Judge or Munsif any contentious proceeding under the Act of 1865 and the Probate and Administration Act, 1881. Though originally in this State, the Tamil Nadu Civil Courts Act, 1873, was passed no provision for any transfer as such had been made therein and this was noticed subsequently which led to the passing of Act XIV of 1926 which introduced section 29 in the Tamil Nadu Civil Courts Act, 1873. Sub-section (2) provided that the District Judge may withdraw any such proceedings taken cognizance of by, or transferred to a Subordinate Judge and may either himself dispose of them or transfer them to a Court under his control competent to dispose of the same. Sub-section (3) provided that notwithstanding anything contained in section 13, proceedings taken cognisance of by or transferred to a Subordinate Judge under the provisions of this section, shall be disposed of by him, subject to the law applicable to like proceedings, when disposed of by the District Judge. In this connection, it is also necessary to refer to two notifications conferring jurisdiction on subcourts dealing with such matters. All Subordinate Judges in Madras Province were appointed as *ex-officio* District Delegates

*C.R.P. No. 5539 of 1983. *18th December, 1984.*

within the local limits of their respective jurisdiction pursuant to a notification by this Court under section 265 of the Act. By yet another notification under section 29 (1) of the Tamil Nadu Civil Courts Act, 1873, all Subordinate Judges have been authorised to take cognizance of proceedings under the Act, which cannot be disposed of by the District Delegates. By virtue therefore of the notifications so made, the Subordinate Judge is invested with the jurisdiction to try a proceeding of the nature now under consideration. By the combined effect of section 29 (1) of the Tamil Nadu Civil Court Act and the notifications referred to earlier the investitute of jurisdiction on the Sub-Courts in such matters does not take away the jurisdiction conferred on the District Judge, so that the District Judge as well as the Subordinate Judge will have concurrent jurisdiction for trying matters arising within the jurisdiction of the District Judge. Under section 213 (1) of the Succession Act even the right as an executor can be established in any Court only if a Court of competent jurisdiction had granted probate of the will under which the right is claimed or has granted letters of administration with the will or with a copy or authenticated copy of the will annexed. A conjoint reading of sections 211 (1) and 213 (1) of the Aet shows that though the executor is the representative of a deceased person, such representative capacity becomes complete only on production of the will and proof of execution of the same in a manner known to law resulting in the obtaining of the probate or letters of administration, as the case may be. In this case, even the will relied on by the petitioner is not before the Court and the Court is called upon to assume that the petitioner is an executor under the terms of a will not made available. Under those circumstances, reliance placed by the petitioner upon section 211 (1) of the Act as justifying the opposition of the petitioner to the grant of letters of administration in her capacity as an executor, cannot be accepted. [*Para 5*]

Essentially in the instant case, the proceeding is one for the proof of the will and not for an investigation into questions of complicated and disputed rival claims of title to the property dealt with under the will [*Para.* 9]

The petitioner is not in any manner related to either M or Z and therefore she has no interest in impeaching the will, as a heir, who would have otherwise taken an interest on intestacy. The test is whether the petitioner would be otherwise entitled to any right, which the grant of probate or letters of administration, would displace, Applying this test, it is seen that the petitioner has not made out that she has such as interest. Therefore the conclusion of the Court below that the caveat lodged by the petitioner has to be struck off has to be upheld. [*Para.* 12]

Cases referred to:—

R. Rama Subbarayalu Reddiar v. *Rengammal*, I.L.R. (1962) Mad. 1001; (1962) 2 M.L.J. 318: 75 L.W. 452: A.I.R. 1962 Mad. 450; *Annammal* v. *Santagu*, (*1980*) *T.L.N.J.* 471 *Ishwardeo Narain Singh* v. *Smt. Kamta Devi*, A.I.R. 1954 S.C. 280; In the matter of last will and codicil of *Smt. N. Venkatanarasamma*, (1975) 1 M.L.J. 379: 88 L.W. 253: A.I.R. 1975 Mad. 330; *M.K. Sowbhagiammal* v. *Komalangi Ammal*, (1928) 54 M.L.J. 382: 27 L.W. 167: A I.R. 1928 Mad. 803; *Komalangi* v. *M K. Sowbhagiammal*, (1930) 59 M.L.J. 529: 32 L.W. 431: A.I.R. 1931 Mad. 37: *Meenakshi Achi* v. *Dr. Chidambaram*, (1979) T.L.N.J. 119; *Mrs. Hem Nolini Judnh* v. *Mrs. Isolyne Sarojbashini Bose*, A.I.R. 1962 S.C. 1471;

K. Sarvabhauman, for Petitioner.

M.R. Narayanaswami, for *R. Srinivasan*, *K*, *Raghunathan* and *V. Prabhakar*, for Respondent.

The Court made the following

ORDER:—This civil revision petition is directed against the order of the Court below striking out the caveat filed by the petitioner in O.P. No. 23 of 1980, Sub-Court. Niligirls at Ootacamund, on an application taken out in that regard by the respondent herein under sections 283 and 284 read with section 285 of tht Indian Succession Act XXXIX of 1925 (hereinafter referred to as the Act). The circumstances giving rise to the revision petition are as follows:

2. In O.P. No. 23 of 1980, Sub-Court, Nilgirls at Ootacamund, the respondent hsrein,

claiming to be a beneficiary to the estate of one Mary Aline Browne who died on 23rd March, 1972, under the terms of a will stated to have been executed by her on 12th March 1962, has filed an application for Letters of Administration with a copy of the will annexed. The testatrix Mary Aline Browne was the wife of Herbert Evander Browne, who was the eldest son of one John Browne. The testatrix had a daughter of the name of Zoe Enid Browne and she died on 8th October, 1977. The respondent prayed that he may be allowed to prove the will dated 12th March, 1962 executed by the testatrix in common form and had filed an affidavit of an attestor of the name of A.D. Dawson, In that proceeding. the petitioner and her deceased husband had lodged a caveat on the ground that Mary Aline Browne did not execute any will and that the will propounded by the respondent herein was a fictitious and forged one intended to disentitle Zoe Enid Browne, daughter of the testatrix, from claiming any interest in the estate of her mother and also to prevent the petitioner from claiming rights under the will of Zoe Enid Browne dated 23rd June, 1975 and under a deed of gift stated to have been executed by her in favour of the petitioner, In I.A. No. 870 of 1981, the respondent put forward the plea that Zoe Enid Browne had at best only a life interest in certain properties and had no estate to bequeath and therefore, the petitioner did not have any interest in the estate of the deceased and further had no *locus standi* to file a caveat. This was repudiated by the petitioner on the ground that she had such an interest on the basis of the will dated 23rd June, 1975, a deed of gift stated to have been executed by Zoe Enid Browne and also in her capacity as a Trustee of John Browne Trust of Ootacamund.

3. Before the Court below on behalf of the respondent Exs. A-1 to A-8 were marked and P.W. 1 and P.W. 2 were examined, while on behalf of the petitioner, Exs. B-1 and B-2 were filed and the petitioner was examined as R.W. 1. On a consideration of the evidence, the learned Subordinate Judge found that the petitioner is not in any manner related to either Mary Aline Browne or Zoe Enid Browne. who were British subjects, that the petitioner has not established that she has any interest in the estate of Mary Aline Browne either on the strength of the deed of gift or even the will dated 23rd June, 1975 stated to have been executed by Zoe Enid Browne in her favour or in her capacity as a Trustee of John Browne Trust of Ootacamund and that in the absence of proof of any interest in the estate, the caveat filed by the petitioner ought to be struck out. It is the correctness of this order that is challenged in this civil revision petition.

4. In support of this Civil Revision Petition, the learned counsel for the petitioner, while not challenging the correctness of the factual conclusions, arrived at by the Court below, urged two points, The learned counsel first submitted that under section 288 of the Act, the Court below, being a district delegate, having regard to the contentious nature of the proceedings before it, ought to have returned O.P. No. 23 of 1980 to the respondent herein with a direction that that proceeding should be presented to the District Court and that without doing. so, had proceeded to consider the same, to do which it had no jurisdiction. On the other hand, the learned counsel for the respondent contended that by virtue of the notification under section 29 (1) of the Tamil Nadu Civil Courts Act, the District Court as well as the Sub-Court have concurrent jurisdiction in matters like this and it was therefore unnecessary for the Court to have resorted to a return of the petition under section 288 of the Act. Reliance in this connection was placed by the learned counsel for the respondent upon the decision of the Full Bench of this Court reported in *R. Rama Subbarayalu Reddiar* v. *Rengammal*[1] and *Annammal and others* v. *Santagu and others*[2].

5. In order to appreciate this contention, it is necessary to briefly notice the provisions of the Act, particularly those relating to the grant and revocation of probate of a will or letters of Administration. The relevant sections are embodied in Chapter VI of Part IX of the Act. The expression "District Judge" is defined by section 2 (*bb*) of the Act as meaning the judge of principal Civil Court of original jurisdiction. Under section 265 of the Act, provision is made for the appointment of judicial officers within the district as the High Court may think fit to act for the District Judge as Delegates to grant probate and letters of administration in non-

1. I.L.R. (1962) Mad. 1001: 75 L.W. 452: (1962) 2 M.L.J. 318: A.I.R. 1962 Mad. 450.

2. (1980) T.L.N.J. 471.

contentious cases under section 264 of the Act, Jurisdiction is conferred on the District Judge to grant or revoke a probate or letters of administration. There is also a restriction in the powers of the District Delegate in that the District Delegate can grant probate or letters of administration when the deceased at the time of his death had a fixed abode. The powers of the District Judge on this matter are wider in that the District Judge can grant the probate or letters of administration where the deceased at the time of his death had a fixed abode or where any movable or immovable properties are situate within his jurisdiction. Non-contentious cases can ordinarily be disposed of by the District Delegate under the provisions of the Act but when once a contest is raised under section 288 of the Act, the matter has got to be returned for presentation to the District Judge. An application for revocation of a grant in a non-contentious proceeding cannot ordinarily be decided by the District Delegate as the filing of the application for the revocation itself would raise a contest. The non-contentious matter can always be referred by the Delegate to the District Judge. In addition, there is also a difference even on the question of the conclusiveness of a grant made by the District Delegate and the District Judge. The conferment of such limited jurisdiction on the District Delegate was not something peculiar under the provisions of the Act only, for. even in the earlier enactments, the difference in the scope of the jurisdiction of the delegate and the District Judge had been maintained. This led to large scale accumulation of work in the District Court and in turn, legislation in several States was passed with a view to enable the High Court to authorise any Subordinate Judge or even Munsif to take cognizance of or any District Judge to transfer to a Subordinate Judge or Munsif any contentious proceeding under the Act of 1865 and the Probate and Administration Act, 1881. Though originally in this State, the Tamil Nadu Civil Courts Act, 1873, was passed no provision for any transfer as such had been made therein and this was noticed subsequently which led the passing of Act XIV of 1926 which introduceed section 29 in the Tamil Nadu Civil Courts Act, 1873. Sub-section (2) provided that the District Judge may withdraw any such proceedings taken cognizance of by, or transferred to a Subordinate Judge and may either himself dispose of them or transfer them to a Court under his control competent to dispose of the same. Sub-section (3) provided that notwithstanding anything contained in section 13, proceedings taken cognizance of by or transferred to a Subordinate Judge under the provisions of this section, shall be disposed of by him, subject to the law applicable to like proceedings, when disposed of by the Distrsct Judge. In this connection, it is also necessary to refer to two notifications conferring jurisdiction on Sub-Courts dealing with such matters All Subordinate Judges in Madras Psovince were appointed as ex-officio District Delegates within the local limits of their respective jurisdiction pursuant to a notification by this Court under section 265 of the Act By yet another notification under section 29 (1) of the Tamil Nadu Civil Courts Act, 1873, all Subordinate Judges have been authorised to take cognizanee of proceedings under the Act, which cannot be disposed of by the District Delegates. By virtue therefore of the notifications so made, the Subordinate Judge is invested with the jurisdiction to try a proceeding of the nature now under consideration. By the combined effect of section 29 (1) of the Tamil Nadu Civil Courts Act and the notifications referred to earlier the investiture of jurisdiction on the Sub-courts in such matters does not take away the jurisdiction conferred on the District Judge, so that the District Judge as well as the Subordinate Judge will have concurrent jurisdiction for trying matters arising within the jurisdiction of the District Judge. Such proceedings in this case have been taken in the Sub-Court and it is only in conformity with the provisions of the Code of Civil Procedure to the effect that the proceedings should be initiated only before the lower court competent to try such a proceeding. The aforesaid position is clearly established by the decision of the Full Bench in *R. Rama Subbarayalu Reddiar* v. *Rengammal*[1] by the following observations:

> "It would appear from the wide terms in which section 29 (1) of the Madras Civil Courts Act is enacted that the Subordinate Judge invested with a power under a notification issued thereunder by the High Court will have jurisdiction to hear and dispose of not merely contentious procee-

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1. I.L.R. (1962) Mad. 1001: (1962) 2 M.L.J. 318: 75 L.W. 452: A.I.R. 1962 Mad. 450.

dings relating to the issue of probate or letters of administration but other matters under the Act as well' '.

6. In *Annammal and others* v. *Santagu and others*[1] the question arose as to proper forum for an appeal in regard to proceedings for the grant of a probate of a will which was presented originally to the District Court, but subsequently dealt with by the Sub-Court on transfer. The appeal was sought to be preferred before this Court. An objection regarding the maintainability of the appeal was raised by the office that the proper forum would be only the District Court and not this Court. In considering this, after referring to the notifications issued by the Court under section 265 of the Act as well as section 29 (1) of the Tamil Nadu Civil Courts Act, it was held that the effect of the order passed by the Subordinate Judge on transfer by the District Judge is the same as that passed by the District Judge exercising the jurisdiction under the provisions of the Act and therefore the appeal filed before this Court was competent. This decision again reiterates the principle that the District Judges and Subordinate Judges, by reason of the notification issued by this Court and also under section 29 (1) of the Tamil Nadu Civil Courts Act, have in the matter of entertaining and disposing of proceedings under the Act, the same jurisdiction as well as similar powers. In view of this, the contention of the learned counsel for the petitioner that since the proceeding before the Subordinate Judge was a contentious proceeding in that a caveat had been lodged or entered by the petitioner, the Subordinate Judge, should have transferred the proceedings to the District Judge since as a District Delegate, the Subordinate Judge was not competent to enter upon and hear the matter, cannot be accepted.

7. The learned counsel for the petitioner next contended that by reason of the will of Zoe Enid Browne stated to have been executed by her on 23rd June, 1975, the petitioner had in her an interest sufficient in law to justify her opposition to the grant of the letters of administration by lodging a caveat and that the court below was in error in holding contra. Reliance in this connection was placed by the learned counsel for the petitioner upon section 211 (1) of the Act as well as some decisions. On the other hand, the learned counsel for the respondent drew attention to the evidence of the petitioner, examined as R.W. 1, to the effect that the petitioner had filed the caveat only on the strength of her interest under the terms of the will of Zoe Enid Browne and pointed out that even the will had not been produced before the Court to show some interest in the petitioner which would enable her to lodge a caveat in opposition to the application for the grant of letters of administration made by the respondent and that the petitioner cannot claim any interest relying upon section 211 (1) of the Act, as an executor under a will not produced and proved. Drawing attention to the scope of the proceedings for probate or letters of administration, the learned counsel for the respondent contended that the enquiry is restricted to the disposing state of mind as well as the dispostion by will and any caveat should also be confined to the scope of the petition and should not be allowed to be converted into a suit for resolving disputed questions of title. Reliance in this connection was placed on the decisions of the Supreme Court in *Ishwardeo Narain Singh* v. *Smt. Kamta Devi and others*[1] and *Will and Codicils of Venkata Narasamma*[2]. Referring to the nature of the interest which would justify the lodging of a caveat, the learned counsel for the respodent submitted that the petitioner has not satisfied the test of displacement of any interest of hers by the grant and therefore, the Court below was right in striking out the caveat lodged by the petitioner. Reference in this connection was made to the decisions in *M. K Sowbagiammal and another* v. *Komalangi Ammal By Guardian Kandaswami Chetti and another*[3], *Komalangi* (minor) *By her father and Guardian Kandasmai Chettiar* v. *M.K. Sowbhagiammal and another*[4], affirming the decision in *M. K. Sowbahagimmal and another* v. *Komalangi Ammal, by Guardian Kandasami Chettiar*[3], *Meenakshi Achi and*

1. (1980) T.L.N.J. 471.

1. A.I.R. 1954 S.C. 280.

2. (1975) 1 M.L.J. 379: 88 L.W. 253; A.I.R. 1975 Mad. 330.

3. (1928) 54 M.L.J. 382: 27 L.W. 167: A.I.R. 1928 Mad. 803.

4. (1930) 59 M.L.J. 529: 32 L.W. 431: A.I.R. 1931 Mad. 37.

others v. *Dr. Chidambaram and others*[1] affirmed by a Division Bench of this Court in *C. V. C. T.* R. *Ranganathan Chettiar* v. *R.M. Meenakshi Achi and others*,[2] Even on the assumption that the petitioner can be regarded as a person having some interest under the terms of the will dated 23rd June, 1975 stated to have been executed by Zoe Enid Brown, the learned counsel would further submit that such an interest can be recognised by the Court only in a manner known to law and in the absence of proof of execution of the will and nature of interest claimed by the petitioner she cannot contend that as a person securing an interest thereunder she must continue to be permitted to oppose the proceeding for the grant of letters of administration by a caveat lodged by her. Reference in this connection was made to the decision of the Supreme Court in *Mrs. Hem Nolini Judah* (since deceased) and *after death her legal Representative Mrs. Mariean Wilkinson Mrs. Isolyne Sarojbashini Bose and others*[3].

8. The petitioner, examined as RW 1, in the course of her cross-examination admitted that she was not in any manner related to late John Browne or Mary Aline Browne or Zoe Enid Browne. She would also further admit that even her husband was not related to either Mary Aline Browne or Zoe Enid Browne. However, she stated that she had lodged a caveat only on the strength of the will of Zoe Enid Browne and further that she has not obtained any probate or letters of administration in relation to that will. The will dated 23nd June, 1975 has also not been produced by the petitioner before the Court and there is no knowing whether as an executor appointed under that will, the petitioner can claim to be a representative of Zoe Enid Browne and interested as such. So, the reliance placed upon section 211 (1) of the Act would not in any manner assist the petitioner to lodge a caveat on the footing that she is an executor under a will which is not produced before the Court. Further, under section 213 (1) of the Act even the right as an executor can be established in any court, only if a court of competent jurisdiction had granted probate of the will under which the right is claimed or has granted letters of administration with the will or with a copy or authenticated copy of the will annexed. A conjoint reading of sections 211 (1) and 213 (1) of the Act shows that though the executor is the representative of a deceased person. such representative capacity becomes complete only on production of the will and proof of the execution of same in a manner known to law resulting in the obtaining of the probate or letters of administration, as the case may be. In this case, even the will relied on by the petitioner is not before the Court and the court is called upon to assume that the petitioner is an executor under the terms of a will not made available. Under those circumstances, reliance placed by the petitioner upon section 211 (1) of the Act as justifying the opposition of the petitioner to the grant of letters of administration in her capacity as an executor, cannot be accepted.

9. In this connection, it is also necessary to determine the scope of the proceedings for the grant of probate or letters of administration. Essentially, the proceeding is one for the proof of the will and not for an investigation into questions of complicated and disputed rival claims of title to the property dealt with under the will. In *Iswardeo Narain Singh v Smt. Kamata Devi and others*[1] the Supreme Court pointed out that the Court is probate is only concerned with the question as to whether the document put forward as the last will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the teastator had sound disposing mind but that the question whether a particular bequest is good or bad is not within the purview of the probate court. In *In re Last Will and Codicil of Venkata Narasamma*, [2] a Division Bench of this Court considered the scope of the proceedings for the grant of probate and it was pointed out that in such proceedings, the caveator will not be entitled to raise title in himself to the whole or any part of the estate of the deceased and that the title of the testator or the testatrix, as the case may be, to the whole or any part of the property forming the subjectmatter of disposition, is entirely and necessarily outside the scope of probate proceedings, as these quesrions can be settled only by a regular suit. Further

1. (1979) T.L.N.J. 119.
2. O.S.A. No. 105 of 1979.
3. A.I.R. 1962 S.C. 1471.

1. A.I.R. 1934 S.C. 280.
2. (1975) 1 M.L.J. 179; 88 L.W. 253 A.I.R. 1975 Mad. 330.

it was pointed out that by the entry of caveat the position of a caveator is no better and a proceeding for probate cannot be and should not be allowed to be converted into a suit for resolving disputed title. Considering the stand taken by the petitioner in the light of the will stand to have been executed by Zoe Enid Browne on 23rd June, 1975, it is obvious that the petitioner is attempting to set up in herself title to certain properties which, according to her, belonged to Zoe Enid Bronwe and had been bequeathed to her under a will. This precisely is not the scope of the proceedings commenced by the respondent and the petitioner cannot, therefore be heard to contend or put forth rights to the property under the will stated to have been executed by Zoe Enid Browne in opposition to the relief of grant of letters of administration made by the respondent in the proceedings initiated for that purpose before the court below.

10. Apart from this, there is one other aspect with would also establish that the petitioner cannot claim that the caveat lodged should not have been struck off in the manner done by the Court below and that relates to the question whether the petitioner as a caveator had the necessary interest. It has already been noticed that the petitioner is not in any manner related to either Mary Aline Brown or Zoe Enid Brown and therefore, she has no interest in impeaching the will, as a heir, who would have otherwise taken an interest on intestacy. The test is whether the petitioner would be otherwise entitled to any right, which the grant of probate or letters of administration, would displace. Applying the test, it is seen that the petitioner has not made out that she has such an interest. Indeed, it is pointed out by Venkatasubba Rao. J., in *M.K. Sowbagiammal and another* v. *Komalangiammal by guardian Kandaswami Chetti and another*[1] that in every case, it must be shown that the caveator, but for the will, would be entitled to a right of which, that will deprives him. While so holding the learned Judge has prefaced it by the following observations at page 383:

> "........I am asked to go into the question of the ownership of these jewels and declare by my judgement, that the deceased was not the owner and that his will in regard to them is inoperative. Two things I regard to be clearly settled by authority, firstly, that the interest alleged is not an interest as would support a caveat, secondly, that a Probate Court does not decide questions of title in regard to the property disposed of by the Will".

11. After so stating, the learned Judge proceeds to observe as follows at page 386.—

> "The function of the court of probate is to decide whether the will propounded is the last will of the testator and whether the right to represent the estate may be conferred upon the applicant. The court of probate does not profess to decide the disputed title to every item of property mentioned in the will. If a testator disposes of, say, 15 items of property and 10 different claimants appear before the Court, each claiming one of them as his own, is the court to postpone the decision on the validity of the will and on the representative character of the applicant, until it decides the disputed ownership of the various items? By delaying the grant, serious injury may be caused to the estate, there being none during this interval to represent it. Then, again, innumerable persons, each with his grievance, may come to oppose the grant, from one who claims a property worth some lakhs, down to one who sets up title to a property worth a paltry sum. It is certainly not to be expected that the application is to be decided in the presence of each one of these claimants. If. then, the scope of a testamentary proceedings is correctly understood, no difficulty can arise. Can the executor to whom probate is granted, on the strength of that probate, recover property which is not the testator's? Does the probate confer on the executor right to property to which he is otherwise not entitled? If it is remembered that these questions ought to be answered in the negative, it does not in the least matter, what the properties are, which the testator professes to treat as his own and to dispose of by his will. The remarks I have made apply equally to applications for letters of administration. In dealing with the question has the caveator the necessary interest; the test is, does the grant displace any right to whieh the caveator would otherwise be entitled? If so, he has such an interest, if not, he has not. An heir on intestacy has an interest

1. (1928) 54 M.L.J. 382: 27 L.W. 167: A.I.R. 1978 Mad. 803.

in impeaching the will; for, but for the will, he would succeed to the property. A legatee under a previous will has a similar interest; for, he is interested in establishing the validity of that will and impeaching the validity of the later will which deprives him of the benefit. A reversionary heir under the Hindu Law has such an interest; for, normally, a widow has only a limited estate and the reversioner is interested in impeaching a will, which professes to enlarge that interest, or again, which purports to confer upon her rights to make an adoption (See *Brindaban Chandra Saha* v. *Sureswar Saha*[1]. But in every case it must be shown that the caveator butfor the will would be entitled to a right of which that will deprives him.

12. This decision was appealed against in *Komalangi Ammal (minor) By her Father and Guardian Kandasami Chettiar* v. *M.K. Sowbhagiammal and another*[2]. In the course of that judgment Ramesam, J. adverted to the claim of ownership made to certain jewels dealt with in the will and it was pointed out to be not an interest in the estate of the deceased as her right to the jewels cannot be affected whether the will is genuine or not. Cornish, J., in the course of his judgment stated that the interest entitling a person to lodge a caveat must be an interest in the estate of the deceased, that is to say, there must be no dispute as to the title of the deceased to the estate, but that the caveator in that case was alleging that the jewels which the testator had disposed of in the will are her own property thereby setting up a title adverse to the testator's title to the property and therefore, it is impossible to say that she had an interest in the deceased's estate when she claimed that the property in question did not form part of the estate of the deceased. Padmanabhan, J, reiterated the aforesaid principles in *Meenakshmi Achi and others* v. *Dr. Chidhambaram and others*[3], and that decision was affirmed by a Division Bench in *Ranganathan Chettiar and others* v. *R.M. Meenakshi Achi*[4]. Applying the aforesaid principles to the facts of petitioner by lodging a caveat, is attempting to protect her own title to the properties on the strength of the will of Zoe Enid Browne stated to have been executed by her on 23rd June, 1975 in opposition to the disposition under the will dated 12th March, 1962 stated to have been executed by Mary Aline Browne. Indeed, it is seen from the objections filed by the petitioner that she desires the Court in these proceedings to uphold her title to certain properties on the strength of a gift as well as a deed of trust. As pointed out earlier, having regard to the scope of the proceedings, the petitioner cannot be permitted to do so, for to recognise the interest claimed by the petitioner would tantamount to accepting that those properties did not form part of the estate of the deceased testatrix in respect of whose will, the letters of administration have been sought for. Since the petitioner was not in any manner related to the deceased testatrix, there is no question of her claiming any interest in the estate of the deceased in her capacity as heir, but for the will dated 12th March, 1962. Equally the petitioner has not placed before the Court the will dated 23rd June 1975 stated to have been executed by Zoe Enid Browne to establish that under the will dated 12th March, 1963 stated to have been executed by Mary Aline Browne, some interest given to the petitioner under the will dated 23rd June, 1975 of Zoe Enid Browne, is liable to be in any manner affected or otherwise displaced, by the grant of letters of administration in respect of the will dated 12th March, 1962 stated to have been executed by Mary Aline Browne. Having regard to these considerations, the petitioner cannot be stated to have satisfactorily established that she has a caveatable interest justifying her opposition to the proceedings initiated by the respondent herein for the grant of letters of administration of the will dated 12th March, 1962 alleged to have been executed by Mary Aline Browne.

13, Earlier, it has been seen how the petitioner has not even produced the will on the strength of which she claims to have an interest in the estate of Mary Aline Browne to justify her lodging a caveat. Even if it can be assumed that Zoe Enid Browne executed such a will in favour of the petitioner as claimed by her on 23rd June, 1975 there would be an insuperable difficulty in the way of the petitioner persuading the Court as accept her case that she has some interest as

1. (1909) 10 C.L.J. 263.
2. (1930) 59 M.L.J. 529: 33 L.W. 411: A.I.R. 1931 Mad. 37.
3. (1979) T.L.N.J. 119.
4. O.S. No. 106 of 1979, dated 5th April, 1984.

an executor or even as a legatee. In the course of the evidence of the petitioner in, her cross-examination, she had admitted that she had not obtained any probate or letters of administration with reference to the will dated 23rd June 1975 stated to have been executed by Zoe Enid Browne. Section 213 of the Act would, under thuse circumstance stand in her way for no right as an executor or a legates can be proved, unless probate or letters of administration of the will, under which such right is claimed has been obtained. Interpreting the scope of this section the Supreme Court in *Mrs. Nolini Judah (Since deceased) and after her legal Representati e Mr. Marcan Wilkinson* v. *Mrs. Isolyne Bose and others*[1], pointed out that the section does not say that no person can claim as a legatee or as an executor unless he obtains probate or letters of administration of the will under which he claims; but that no right as an executor or legatee can be established in any court of Justice, unless probate or letters of administration, have been obtained of the will, under which the right, is claimed and therefore, whosoever wishes to establish that right, whether it be a legatee or an executor himself or somebody else, who might find it necessary in order to establish the right of some legatee or executor from whom he right have derived title, he cannot do so unless the will under which the right as a legatee or executor is claimed, has resulted in the grant of a probate or letters of administration. It is therefore clear that if the petitioner wishes to establish her right either as a legatee or as executor undsr the will dated 23rd June, 1975 stated to have been executed by Zoe Enid Browne, she can do so only by obtainiug a probate or letters of administration and without that, the Court cannot counteuance rights projected by her either as executor or as legatee, in view of the provisions of section 313 of the Act..Thus, on a consideration of the nature of the interest of the petitioner as well as the objections raised by her and the non-obtaining of a probate of the will dated 23rd June, 1975 stated to have been executed by Zoe Enid Browne the petitioner cannot claim to be a person who has a caveatable interest in the estate of the deceased testatrix Mary Aline Browne, in respect of whose will, proceedings for the letters of administration have now been taken by the respondent, On a careful consideration of the entire matter the conclusion of the court below that the caveat lodged by the petitioner has to be struck off is quite correct and has to be upheld. There is no illegality or irregularity in the order so passed by the Court below. No other point was urged. Consequently, the civil revision petition fails and is dismissed with costs.

R.S. —— *Petition dismissed.*

1. A.I.R. 1962 S.C. 1471.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—*S. Nainar Sundaram, J.*

Mohammed Abdulla .. *Petitioner**

v.

P.M. Abdul Rahim .. *Respondent.*

Civil Procedure Code (V of 1908), sections 13 (a) (b) (c), 44-A (*1*) *and* (2)—*Defendant taking a loan from plaintiff to be repaid within* 3 *months—Failure to pay—Action filed in Court at Kualalampur in Malaysia—Court outside India—Decree obtained—Executability of the same in Indian Courts—Suits of personal nature—jurisdiction of foreign Courts to decree such suit—"Judgment"—When said to be given on merits.*

The defendant had borrowed a sum of money from the plaintiff on 1st June, 1976 promising to repay the same in 3 months, The defendant failed to so pay in spite of repeated demands and was recalcitrant. Thereupon the plaintiff filed Civil Action No. 1935 of 1981 in the Sessions Court at Kualalampur in Malaysia in October, 1981, Summons in the action were served twice on the defendant in October—November, 1981. After the service of the first summons, the defendant passed on a letter of 28th October, 1981 acknowledging receipt of the summons and the statement of claim annexed thereto and consenting to a judgment being passed against him for Rs. 13,420. A decree for the amount was accordingly passed. When he gave the letter of consent and at all the relevant dates the defendant was a resident of Kualalampur. The decree-holder took out execution in the Court of the District Judge, East Thanjavur. The judgment-debtor resisted the execution alleging that the foreign judgment was not passed by a Court of competent jurisdiction since he was not a

*C.R.P. No. 4281 of 1984. 19th December, 1984.

is during the lifetime of the father-in-law and when he is in possession of the coparcenary property. Under section 22 the liability arises after the lifetlme of the father-in-law and a widowed daughter-in law claims maintenance as a dependant. The claim is made against the heirs inheriting the property of her deceased father-in law. It is immaterial whether the property inherited by the heirs was coparcenary or self-acquired property of the deceased. From the above analysis of section 19 and 22 it is obvious that the plea that no statutory liability is created under section 22 and the liability is created only under section 19 has to be straightaway. rejected, The statutory liability created under sections 19 and 22 are invoked by the widowed daughter-in-law at different points of time against different persons and in different capacities. When there is a statutory liability for the father-in-law to main. tain his daughter-in-law his heirs inheriting his property are automatically liable to maintain the widowed daughter-in-law. No statutory provision is required to cover such a contingency. The plea that section 22 was enacted to cover only such a contingency is not warranted by a plain reading of section 22. Such an interpretation unduly narrows the scope of section 22, which is not warranted by the language employed in section 22. *[Para. 8]*

Cases referred to :—

N. Appavu Udayan v. *Nallammal*, (1948) 1 M.L.J. 110: I.L.R. (1949) Mad. 16: 61 L.W. 101: A.I.R. 1949 Mad. 24; *Mukta Bai* v. *kamalaksha*, A.I.R. 1960 Mys. 182. *Ust. Rupa Guantiani* v. *Mst. Sriyabati*, A.I.R. 1955 Orissa 28.

R. Srinivasan, for Appellant

K. Raghunathan, for Respondents 2 to 6

V. Sridevan, for 1st Respondent.

The Court delivered the following

JUDGMENT.—The second defendant is the appellant. The plaintiff and defendants 3 to 8 are the respondents. The suit properties originally belonged to one Sambamurthi Iyer, He had a son by name Halasyam Iyer and a daughter, the first defendant herein. Plaintiff is the wife of Halasyam Iyer, who pre-deceased his father Sambamurthi Iyer. The first defendant died during the pendeucy of the suit and defendants 2 to 8 are added as the legal representatives of the deceased first defendant. Though the plaintiff contended in the earlier suit O.S. No. 21 of 1963 ou the file of the District Munsif's Court, Mayuram, that the properties were the joint family properties and Sambamurthi Iyer was not the exclusive owner and not competent to execute a will in respect of all his properties the suit ultimately went against her as a result of the decision of this Court is A.S No. 19 of 1968.

2. The plaintiff's present case is that she was bonnd to be maintained by her father-in-law during his lifetime and even if it is held to be only a moral obligation, on his death it ripened into a legal liability and is capable of being enforced against the estate of the said Sambamurthi Iyer, now in the hands of the first defendant, as a result of the will executed by Sambamurthi Iyer. According to the plaintiff the estate of Sambamurthi Iyer is capable of yielding a net annual income of not less than 500 kalams of paddy worth of Rs. 15,000. and the house at Mayuram and other non-agricultural properties will yield an annual incoms of Rs. 2,500. The plaintiff has claimed past maintenance at the rate of Rs. 500- per month for a period of nine months and future maintenance at the same rate of Rs. 505- per month with a charge on the B Schedule properties.

3. The defence is that the properties were the self acquired properties of Sambamurthi Iyer andthere were no co-parcenary properties on the date of his death and the said Sambamurthi Iyer executed a will in favour of the first defendant and the will does not provide for any obligation on the part of the first defendant to maintain the plaintiff and the entire estate will yield only a net income of Rs.5000- and the claim for maintenance at the rate of Rs. 500- per month is excessive.

4. The trial Court held that (1) the plaintiff, who is the daughter-in-law of Sambamurthi Iyer, is a dependant and (2) she has not inherited any share in the estate of the deceased and by virtue of section 22 of the Hindu Adoptions and Maintenance Act, 1956, the liability to maintain the dependant from the estate of the deceased continues, (3) the expression "heir" as used in section 22

includes all those on whom the estate of the deceased devolves whether on intestacy or by means of a testamentary instrument like a will, and whoever gets the estate of the deceased or a part of it, must in proportion get aloug with it a corresponding obligation or burden of maintaining the dependants of the deceased and as the defendants are in possession and enjoyment of the estate of Sambamurthi Iyer, by virtue of section 22 they are liable to maintain the plaintiff.

5. Considering the extent of the lands and the income, the trial Court awarded past maintenance for a period of nine months at the rate of Rs. 100/- per month and future maintenance at the rate of Rs. 200/- per month with a charge on the B Schedule properties. Against this decree and judgment of the trial Court the second defendant has preferred the present appeal.

6. The on tentions of the learned counsel for the second defendant-appellant may be summarised as under: Under section 19 of the Hindu Adoptions and Maintenance Act, 1956, the liability of the father-in-law to maintain the widowed daughter-in law arises only if he is in possession of coparcenary property. No liability arises when the father-in law is not in possession of coparcenary property. The statutoryliability of the father-in-law to maintain the widowed daughter-in-law in the event of his having coparcenary property passed on his death to the heirs inheriting his property. This is what is provided under section 22. If there is no statutory liability for the father-in-law to maintain his widowed daughter-in-law the heirs taking his property cannot be saddled with any such obligation. Section 22 does not create any independent statutory obligation for the father-in-law to maintain the widowed daughter-in-law. The statutory obligation is created only under section 19 and if he dies leaving no coparcenary property his heirs inheriting his property are under no legal obligation to maintain the widowed daughter-in-law. A harmonious construction of sections 19, to 22 can only lead to such an interpretation. Otherwise we see the anomaly of a father-in-law having no coparcenary property and having no legal obligation to maintain his widowed daughter-in-law during his lifetime and yet, after his death, his heirs taking his property are statutorily made liable to maintain the daughter-in-law. The legislature would not have intended such an anomalous situation and an interpretation leading to an illogical conclusion should not be favoured. It follows that as the father-in-law died without leaving any coparcenary property, his heirs inheriting his self-acquired property, namely the appellant, is under no obligation to maintain the widowed daughter-in-law.

7. The contentions of the learned counsel for the respondents can be summarised as under: As laid down in a decision of this Court reported in *N. Appavu Udayan and another* v. *Nallammal*[1] and a decision of the Orissa High Court reported in *Mst. Rupa Guantiani and another* v. *Mst. Sriyabati*[2] under the old traditional Hindu Law moral obligation of the father-in-law to maintain his widowed daughter-in-law out of his self-acquired property ripens into a legal obligation after his death and this is sought to be given effect to by sections 19 to 22 of the Hindu Adoptions and Maintenance Act, 1956. Section 19 creates a statutory liability on the father-in-law during his lifetime, while section 22 creates the liability on his death when his heirs inherit his properties. The contention that the liability is created only under section 19 and section 22 can be invoked only when there is a pre-existing liability under section 19, cannot be accepted. In support of this contention the learned counsel also relied on a decision of the Mysore High Court reported in *Mukta Bai and others* v. *Kamalaksha and others*.[3]

8. Section 19 casts a statutory liability on the father-in-law not having coparcenary property to maintain his widowed daughter in-law. Section 22 provides that a dependant of a male or a female deceased Hindu, who has not obtained any share in the estate of the deceased dying after the commencement of the Act, is entitled to maintenance from those to whom the estate of the deceased person has passed. Thus section 22 (1) creates a right in favour of a dependant to

1. (1948) 1 M.L.J. 110 I.L.R. (1949) Mad. 16: 61 L.W. 101: A.I.R. 1949 Madras 24.
2. A.I.R. 1955 Orissa 28.
3. A.I.R. 1960 Mysore 182.

be maintained out of the estate of a person who dies after the commencement of the Act. For a person to be maintained out of the estate of the deceased the two requirements under section 22 (1) are (*a*) the person claiming maintenance must be a dependant of the deceased and (*b*) the deceased should have died after the commencement of the Act. Section 21 defines "dependants" and a widowed daughter-in-law is a dependant of her deceased father-in-law. Thus, sections 19 and 22 create two different kinds of liabilities on the father-in-law to maintain his widowed daughter-in-law at two different points of time. Under section 19 the liability is during the lifetime of the father-in-law and when he is in possession of coparcenary property. Under section 22 the liability arises after the lifetime of the father-in-law and a widowed daughter-in-law claims maintenance as a dependant. The claim is made against the heirs inheriting the property of her deceased father-in-law. It is immaterial whether the property inherited by the heirs is coparcenary property or self-acquired property of the deceased. From the above analysis of sections 19 and 22 it is obvious that the plea that no statutory liability is created under section 22 and the liability is created only under section 19 has to be straightaway rejected. The statutory liability for maintenance created under sections 19 and 22 are invoked by the widowed daughter-in-law at different points of time against different persons and in different capacities. When there is a statutory liability for the father-in-law to maintain his widowed daughter-in-law his heirs inheriting his property are automatically liable to maintain the widowed daughter-in-law. No statutory provision is required to cover such a contingency. The plea that section 22 was enacted to cover only such a contingency is not warranted by a plain reading of section 22. Such an interpretation unduly narrows the scope of section 22, which is not warranted by the language employed in section 22. The decision of the Mysore High Court in *Mukta Bai and others* v. *Kamalaksha and others*[1] relied on by the learned counsel for the respondent fully supports the above rpreetintation. In view of the decision in A.I.R. 1961 Punjab 288 the defendant's liability is not excluded by use of the expression "heir"[4] in section 22. The finding of the trial Court that the defendants are in possession and enjoyment of the estate of Sambamurthi Iyer and by virtue of section 22 of the Hindu Adoptions and M aintenance Act, 1956, they are liable to maintain the plaintiff who is a dependant of Sambamurthi Iyer, has to be confirmed.

9. The next question for consideration is regarding the quantum of maintenance. Learned counsel for the appellant contended that the rate of maintenance awarded by the trial Court is excessive and unreasonable. Learned counsel for the respondent, who has also filed a memorandum of cross-objections, contended that even the maintenance awarded by the trial Court is too low and it should be further increased

10. According to the plaintiff, the agricul tural lands would yield a net annual incom of Rs. 15,000/- and the house at Mayuram and other non-agricultural properties will yield an annual net income of Rs. 2,500/- The contention of the defendants is that in the earlier suit the Commissioner appointed has submitted a report giving the average income from the properties at Rs. 4,000/- to Rs. 5,000/- As the price of agricultural commodities have gone up and as the urban property is fetching a higher rate of rent, the trial court's estimate that the net income can be arrived at Rs. 7,500/- cannot be stated to be excessive or unreasonable. The plainsiff is the only person to be maintained as on date from the estate of the deceased. Her only daughter had been given in marriage and her son-in-law is stated to be well placed in life. The plaintiff is accustomed to ordinary way of living and considering the net income of the properties, the trial court awarding future maintenance at the rate of Rs. 200/- per month and past maintenance at the rate of Rs. 100/- per month fo rnine months, appears to be quite reasonable and does not call for any interference by this Court.

11. In the result appeal as well as the memorandum of cross-objections stand dismissed. The parties to bear their own costs. The Court fee payable on the memorandum of cross objections filed *in forma pauperis* has to be borne by the plaintiff-first respondent.

R.S. ——— *Appeal dismissed*.

1. A.I.R. 1960 Mys. 182.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction)

PRESENT:—*S. Nainar Sundaram, J.*

C. S. Narayanaswamy Iyer .. *Petitioner**

v.

The District Revenue Officer, Thanjavur and another .. *Respondents*

Tamil Nadu Agricultural Lands Record of Tenancy Rights Act (X of 1969), section 7—Revision to the District Revenue Officer filed in time—Papers returned—Re-presented after a delay of 18 months—Rejected on the ground of delay in re-presentation—Order quashed.

Held.—The fact remains that there was a regular revision preferred within time and the same was returned for rectification and the same was re-presented on 1st December, 1980. It was not as if the petitioner had no valid reason to explain the delay in re-presentation. He ventured to offer an explanation by a subsequent petition which however proved abortive on a technical ground that the application to condone the delay after orders had come to be passed in the revision itself was not maintainable. The reasons offered for the delay in re-presentation are not totally un-convincing. It is claimed that the counsel who was in charge of the case of the petitioner left the locality and shifted his practice to some other placc It is only a question of condoning the delay in re-presentation and the explanation offered cannot bc eschewed as an-acceptable. Further there is no indication in the impugned order that any perticular time was prescribed for re-presentation of the papers in revision. If there was a delay in re-presenting the said papers within any prescribed time, interests of justice required that the petitioner ought to have been called upon to explain the delay and if there had been a failure to do so, then, there would have been a warrant to reject the revision. This salutary principle has not been applied by the first respondent and this has practically resulted ln a miscarriage of justicec. The revision having been preferred within time and when there was in fact, an acceptable explanation for the delay in re-presentation, if that was there and which explanation, of course, the petitioner could bring to the notice of the first respondent at the relevant point of time in the circumstance stated above, the rejection of the revision by the first respondent cannot be countenanced, [*Para.* 1.]

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the District Revenue Offieer, Thanjavur, dated 9th December, 1980 and made in L.K. Dis. 233277/80 J and quash the same.

R. Srinivasan, for Petitioner.

P. Chandrasekaran, Government Advocate, for 1st Respondent,

B. Rajagopalan, for Second Respondent,

The Court made the following

ORDER:—The original petitioner hereinafter referred to as the petitioner was the landowner within thc meaning of the Tamil Nadu Agricultural Lands Record of Tenancy Rights Act 10 of 1969, hereinafter referred to as the Act. The petitioner is no more and his legal representatives have come on record. The second respondent claims himself to be the tenant within the meaning of the Act. On 11th April, 1979, second respondent succeeded in obtaining an order from the Sub Collector, Kumbakonam directing his name to be recorded as the tenant under the Act. The petitioner preferred a revision to the first respondent on 13th June, 1979. There is no dispute about the presentation of the revision to the first respondent on 13th June, 1979. There is no dispute that the presentation of the revision on that date was within time. The said revision was returned on 21st June, 1979, pointing out certain defects and the petitioner was called upon to rectify the same. The revision petition was re-presented on 1st December, 1980, By the impugned order dated 9th Decembcr, 1980, the first respondent has rejected the very revislon and the said order is being impugned in the present writ petition. The reason given for rejecting the revision is that there was a delay of 18 months. The fact remains that there was a regular revision preferred within time and the same was returned for rectification

*WP. No. 3168 of 1984. *18th July*, 1984.

and it was re-presented on 1st December, 1980. It was not as if the petitioner had no valid reason to explain the delay in re-presentation. He ventured to offer an explanation by a subsequent petition which however proved abortive on a technical ground that the application to condone the delay, after orders had come to be passed in the revision itself, was not maintainable. The reasons offered for the delay in representation are not totally unconvincing. It is claimed that the counsel who was in charge of the case of the petitioner left the locale and shifted his practice to some other place. It is only a question of condoning the delay in re-presentation and the explanation offered cannot be eschewed as unacceptable. Further we do not get any indication from the order impugned that any particular time was prescribed for re-presentation of the papers in revision. It there was a delay in representing the said papers within any prescribed time, interests of justice required that the petitioner ought to have been called upon to explain the delay and if there has been a failure to do so, then there would have been a warrant to reject the revision. This salutary principle has been omitted to be applied by the first respondent, and this has practically resnlted in a miscarriage of justice. The revision having been preferred within time and when there was, in fact. an acceptable explanation for the delay in re-presentation, if that was there and which explanation, of course, the petitioner could not bring to the notice of the first respondeot at the relevant point of time in the circumstances stated above, the rejection of revision by the first respondent cannot be countenanced and upheld. In the said circumstances, the writ petition is allowed; the revision filed by the petitioner will be taken on file by the first respondent and disposed of on merits in accordance with law as expeditiously as possible, and in any event, within a period of three months from the date of receipt of copy of this order, after giving notice to the second respondent. There will be no order as to costs.

R.S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ratnam, J.*

M.V. Swami .. *Petitioner**

v.

Ameer Basha and another .. *Respondents*

(A) Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), as amended by Act (XXIII of 1973), sections 10 (2) (i) and 10 (2) (ii)(a)—Scope and applicability.

(B) Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 2 (6)—'Landlord'— Definition of - Co-owner of property as much owner of the entire property as any sole owner—Relationship of landlord and tenant made out only between the first respondent and the petitioner—Objection regarding maintainability of eviction petition—Allegation that first respondent alone is not competent to maintain the action overruled.

Held: In view of the decision in *Sri Ram Pasricha v. Jagannath*, (1976) 4 S C.C. 184: 1977 R.C J., 194: (1977) 1 S.C.R. 395: A.I.R. 1976 S.C. 2335 which clearly laid down that the presence of the other co-owners is unnecessary the objection in that regard raised by the petitioner cannot be conntenanced. Thus the objection regarding the maintainability of the application has no substance at all and has to be rejected. [*Para.* 7]

It is manifest that the case of the petitioner that the rents from June, 1981 upto 31st October, 1981, have not been paid cannot be accepted. If as the petitioner would have it, there was a tender of the rent by the petitioner for the period in question and a wrongful refusal on the part of the first respondent to take the rent to be tendered, then the petitioner should have issued a noticc to 1st respondent or at least taken necessary steps to protect his rights as a tenant without being exposed to the risk of eviction. No such notice was issued, nor steps taken by the petitioner to countenance the wrongful refusal to receive the rents alleged against and attributed to the 1st respondent. Besides the conduct of the petitioner in depositing a lump sum of Rs. 500/- only on 29th June, 1982 for a period of about 7 months also

* C.R.P. No. 960 of 1984. *13th July,* 1984.

indicates that the petitioner had not been regular in payment of rent. Indeed there is no satisfactory or acceptable explanation at all on the part of the petitioner for his omission to pay the rents periodically as and when such rents fell due. More than anything else in this ease a notice had also been issued to the petitioner drawing his attention to the non-payment of the rent from June, 1981 onwards and the inaction of the part of the petitioner clearly establishes supine indifference on his part in the payment of rent. [*Para.* 8]

The evidence of the name-board of the typewriting institute and the admission of the petitioner to the effect that the licence for the Institute stands in the name of the wife of the second respondent and the attachment proceedings under Exhiblt P-5 clearly establish that the premises let out to the petitioner was under the occupation of the 2nd respondent herein for the purpose of running a typewriting institute in the name of his wife. Under these circumstance clearly a case of sub-letting has been established. [*Para.* 8]

Cases referred to:—

Alagiyanatha Pillai v. *M. Swaminatha Pillai*, (1980) 1 M.L.J. 274; *Sri Ram Pasricha* v. *Jaganath*. (1976) 4 S.C.C. 184: (1977) 1 S.C.R. 395: (1977) 2 R.C.J. 494: A.I.R. 1976 S.C. 2335; *Kanta Goel*, v. *B.P. Pathak*, (1977) 2 S.C.J. 277: (1977) 3 S.C.R. 412 (1977) 2 S.C.C. 814: A.I.R. 1977 S.C. 1599; *Sri. Rajalokshmi Dyeing Works* v. *Rangaswamy Chettiar*, (1980) 2 R.C.J. 165: A.I.R. 1980 S.C. 1253.

P.R. Krishnan, for Petitioner

M.N. Padmanabhan, for Respondents.

The Court made the following

ORDER:—The tenant is the petitioner in this civil revision petition directed against the order of eviction passed by the authorities below on an application filed in H.R.O. No. 96 of 1981, Rent Controller's Court; Tirupattur by the 1st respondent herein under sections 10 (2) (i) and 10 (2) (ii) (e) of the Tamil Nadu Buildings (Lease and Rent Control) Act 18 of 1963 (as amended by Act 23 of 1973) (hereinafter referred to as the Act). According to the case of the 1st respondent, he along with his brother and sister are the owners of the property in the occupation of the petitioner and the petitioner had entered into on agreement of tenancy with the 1st respondent agreeing to pay rest at the rate of Rs. 70/- per month. The 1st respondent stated that the petitioner had committed wilful default in the payment of rents from June, 1981 onwards. Further the petitioner, according to the 1st respondent, had without the consent in writing of the 1st respondent, sublet the property let out to him to the 2nd respondent herein for running a typewriting institute. A notice was sent to the petitioner bringing to his notice wilful default as well as the subletting and demanding vacant possession but the petitioner did not send any reply at all. It was under these circumstances that the first respondent prayed for an order of eviction.

2. In his counter, the petitioner resisted the application on the ground that the 1st respondent alone was not competent to maintain the application for eviction, that the tenancy commenced under the father of the 1st respondent and after his death, the rents had been paid to the first respondent regularly, that there was no wilful default in the payment of the rents, that if at all the rents had remained unpaid from 1st November, 1981 and even in respect of that, when the rents were tendered against a demand for receipt' there was a refusal to issue receipt and therefore, the rent from 1st November, 1981 onwards upto 31st May, 1982 was deposited into court on 29th June, 1982 and that the subletting was not true and therefore the eviction petition should be dismissed.

3. Before, the Rent Controller (District Munsif, Tirupattur) on behalf of the 1st respondent Exs. A-1 to A-6 were marked and the 1st respondent and another were examined as P.Ws. 1 and P.W. 2, while, on behalf of the petitioner, Exs. B-1 to B-4 were filed and the petitioner and another were examined as R.W. 1 and R.W. 2. On a consideration of the oral as well as the documentary evidence, the learned Rent Controller found that the petitioner had committed wilful default in the payment of the rents from June 1981 as claimed by the 1st respondent and that the petitioner had also sublet the premises in his occupation in favour of the 2nd respondent without the consent in writing of the 1st respondent. On the conclusions, the order for eviction was passed against the petitioner. Aggrieved by this, the petitioner preferred an appeal in R.C.A. No. 13 of 1983 before the appellate authority (Sub-Court, Tiruppatur) on an exhaustive

reconsideration of the case of the petitioner as well as the 1st respondent on the basis of the evidence let in is that behalf, the appellate authority upheld the conclusions of the Rent Controller and dismissed the appeal. It is the correctness of this order that is challenged in this civil revision petition.

4. The learned counsel for the petitioner first contended that the authorities below had not adverted to the objection raised by the petitioner regarding the maintainability of the application for eviction and that would vitiate the order. According to the learned counsel, even as per the case of the 1st respondent. In his application for eviction, his brother and sister were co-owners of the property tenanted in favour of the petitioner and since they have not joined in the application for eviction, it would not be open to the 1st respondent alone as one of the co-owners to institute proceedings seeking an order for eviction. Reliance in this connection was also placed by the learned counsel upon the decision in *A. Alagiyanathan* v. *N. Swaminatha Pillai*[1]. On the other hand, the learned counsel for the 1st respondent submitted that the petitioner had admitted the payment of rents by him to the 1st respondent and it would therefore be not open to the petitioner to urge that the non-joining of the brother and the sister of the 1st respondent in the applications for eviction would be fatal to its maintainability. The learned counsel for the 1st respondent relied upon Exhibits B-3 and B-4 and the evidence of R.W. 1 to contend that rents had been paid by the petitioner to the 1st respondent.

5. Though in paragraph 3 of the counter filed in opposition to the application for eviction the petitioner had raised an objection that the 1st respondent alone is not competent to maintain the application for eviction, such an objection does uot appear to have been persisted in by the petitioner during the course of the proceedings before the authorities below. Indeed, a perusal of the order of the Rent Controller does not show that one of the points in controversy between the parties was in relation to the maintainability of the application for eviction, in the absence of a specific point for decision in that regard, the matter had not been naturally investigated by the Rent Controller. When the matter came up before the appellate authority, at least, one could have expected the petitioner to draw its attention on the omission by the Rent Controller to consider this aspect of the matter. Even here, it is seen from the grounds of appeal filed by the petitioner before the appellate authority that there is no whisper about the maintainability of the application for eviction filed by the 1st respondent herein on the ground stated by the petitioner in his counter and there was therefore no occasion even for the appellate authority to go into this question. In the memorandum of civil revision petition since the objection regarding the maintainability of the application for eviction has not been specifically raised the learned counsel for the petitioner was frank to concede this. Even so, the objection regarding the maintainability of the application for eviction being a basic or fundamental one, can be considered with reference to the facts and the circumstances of the case. Even according to the petitioner as per his stand in paragrah 4 of the counter filed by him in the application for eviction, his tenancy commenced under the father of the 1st respondent 15 years back and that after his death, the rents had been paid by the petitioner to the 1st respondent. Exhibits B-3 and B-4 are the receipts dated 1st April, 1978 and 1st June, 1979 respectively admittedly issued by the 1st respondent in favuar of the petitioner in respect of the rents paid by him for months of March and May, 1979. These receipts clearly establish the payment of rent by the petitioner to the 1st respondent, In the course of his chief-examination, the petitioner, examined as R.W. 1 has admitted that the rent receipts are Exhibits B-3 and B-4. A consideration of Exhibits B-3 and B-4 in the light of the evidence of R.W. 1 and the fact that the 1st respondent is the person who has been receiving or is entitled to receive the rent with reference to the building in the occupation of the petitioner and would therefore be himself a "landlord" within the meaning of section 2 (6) of the Act the objection raised by the petitioner that the brother and the sister of the 1st respondent should also have joined in the application for eviction, therefore, lacks substance.

6. Even assuming that the 1st respondent was only one of three co-owners of the building it in the occupation of the petitioner, he had been receiving the rents and also entitled to receive the rents not only on his behalf, but also on behalf of the other co-owers as well and would, therefore, be a landlord

1. (1980) 1 M.L.J. 274.

under section 2 (6) of the Act. Apart from this, a co-owner is as such an owner of the entire property as any owner of a property is. In *Sri Ram Pasricha* v. *Jagannath and others*[1] the Supreme Court had occasion to consider whether a co-owner would be the owner within the meaning of section 13 (1) (f) of the West Bengal Premises Tenancy Act, 1956. The Supreme Court pointed out that jurisprudentially it is incorrect to say that a co-owner of a property is not its owner as such co-owner owns every part of the composite property along with others and he cannot be said to be a part owner or a fractional owner of the property. It was further laid down that there will be a change in the position only when a partition takes place and therefore, person who is landlord and co-owner of the premises would be within the meaning of the expression "owner' occurring in section 13 (1) (f) of the West Bengal Premises Tenancy Act, 1956 and it is unnecessary for the co-owner to establish that he is the only owner of the property so long as he is a co-owner and had been acknowledged as the landlord. To similar effect is the decision of the supreme Court in *Kanta Goel* v. *B.P. Pathak and others*[2]. In that case, the question arose whether with reference to the proceedings initiated under section 14 (4) of the Delhi Rent Control Act 59 of 1958, it would be necessary to implead the other co-heirs as landlords and whether the omission to do so will be fatal to the application itself. After referring to the decision in *Sri Ram Pasricha* v. *Jagannath and others*[1] the Supreme Court observed that the law had been put beyond doubt in that decision and that the absence of the other co-owners on record would not disentitle one of the co-owners from suing for eviction. In view of the aforesaid decisions of the Supreme Court which clearly laid down that the presence of the other co-owners is unnecessary, the objection in that regard raised by the petitioner cannot be countenanced at all. That leaves for consideration the decision in *Alagiyanathan* v. *M. Swaminatha Pillai*[3] relied on by the learned counsel for the petitioner. In that case, on facts it was found that the respondent and his brother were living separotely and had been independently collecting the rents and a suit for partition was also pending between the co-owners. It was also further found that possession of the building was not sought on behalf pf all the co-owners but only for his personal benefit. It was under those circumstances that it was held that application for eviction filed by one co-owner without reference to the others was held to be not maintainable. In view of the pronouncements of the Supreme Court referred to earlier, the applicability of the decision in *A. Alagiyanathan* v. *M, Swaminatha Pillai*[1], should be confind to its facts and cannot be made applicable to a case like this where the relationship of landlord and tenant is clearly made out between only the 1st respondent and the petitioner. Thus, the objection regarding the maintainability of the application has no substance at all and has to be rejected.

7. The learned counsel for the petitioner next contended that the authorities below have erroneously concluded that the petitioner had committed wilful default in the payment of rents: but this contention cannot be accepted. The application for eviction had been preceded by a notice addressed to the petitioner as well as the 2nd respondent that has been marked as Ex. A-1. In paragraph 2 of Ex. A-1, the 1st respondent has clearly stated that the petitioner had failed and defaulted to pay the rent at the rate of Rs. 70/- p.m. from June, 1981 onwards. Ex A-1 had been served on the petitioner under Ex. A-2. If, in fact, the petitioner had paid the rents for the period in question. one would have expected him to immediately send reply to Ex. A-1 to the effect that the rents had been paid. No reply at all has been sent to Ex. A-1 and this clearly establishes that the petitioner had not paid the rents as a matter of fact. Besides. the case of the petitioner that there was a refusal to issue receipts and that led to the non-payment of the rent appears to be unacceptable. Exs. B-3 and B-4 clearly show that whenever rents are paid by the petitioner to the 1st respondent, receipts had been issued and the issue of receipts had also been admitted by the petitioner in his evidence as R.W. 1. In addition, R W. 1 would state that the rents for the premises had been paid from the funds of a political party but such payment had not been proved by the production of any account. It is thus manifest that the case of the petitioner that the rents from June

1. (1976) 4 S.C.C. 184: (1977) 1 S.C.R. 395: (1977) R.C.J. 494: A.I.R. 1976 S.C. 2335.

2. (1977) 2 S.C.C. 814: (1977) 2 S.C.R. 277: (1977) 3 S.C.R. 412 A.I.R. 1977 S.C. 1599.

3. (1980) 1 M.L.J. 274.

1. (1980) 1 M.L.J. 274.

1981 upto 31st October, 1981 had been paid cannot be accepted. If, as the petitioner would have it, there was a tender of the rent by the petitioner for the period in question and a wrongful refusal on the part of the 1st respondent to receive the rents so tendered, then the petitioner should have issued a notice to the 1st respondent or at least taken the necessary steps to protect his rights as a tenant without being exposed to the risk of eviction. No such notice was issued, nor steps had been taken by the petitioner to countenance the wrongful refusal alleged against and attributed to the 1st respondent. Besides, the conduct of the petitioner in depositing a lump sum of Rs. 500 only on 29th June, 1982 for a period of about 7 months also indicates that the petitioner had not been regular in the payment of the rents. Indeed, there is no satisfactory or acceptable explanation at all on the part of the petitioner for his omission to pay the rent periodically as and when such rents fell due. More than anything else in this case, a notice had also been issued to the petitioner drawing his attention to the non-payment of the rent from June, 1981 onwards and the inaction on the part of the petitioner clearly establishes supine indifference on his part in the payment of rents. The authorities below were therefore quite justified in concluding that the petitioner had committed willful default in the payment of the rents.

8. Lastly, the learned counsel for the petitioner contended that the subletting of the premises by the petitioner in favour of the 2nd respondent without the consent in writing of the 1st respondent has not been established. Here again, having regard to the materials available, the contention has to be rejected. There is no dispute that in the premises in the occupation of the petitioner there is a typewriting institute. R.W. 1, in the course of the chief examination and cross-examination would admit that Saravana Typewriting Institute is housed in the premises and the licence for this stands in the name of the wife of the 2nd respondent. He would also further admit that no permission was obtained. Thus, on the admission of R.W. 1, a clear case of subletting is established. Besides, it is seen from Explanations A-4 and A-5 that a decree had been obtained by Mini Finance Corporation against the 2nd respondent herein, and others in Small Cause Number 17 of 1981 D.M.C. Tirupathur on 10th December, 1981 for a sum of Rs. 126-50 and the typewriter in the institute run by the 2nd respondent was directed to be attached in execution of the decree. The attachment of the typewriter belonging to the 2nd respondent in the premises tenanted to the petitioner clearly shows that the 2nd respondent was in occupation of the premises for purposes of running a typewriting institute even as admitted by R.W. 1. The existence of the name board of the typewriting institute and the admission of the petitioner as R.W. 1 to the effect that the licence for the institute stands in the name of the wife of the 2nd respondent and the attachment proceedings under Exhibit A-5 clearly establish that the promises let out to the petitioner was under the occupation of the 2nd respondent herein for the purpose of running a typewriting institute in the name of his wife. It is not the case of the petitioner that he had obtained the consent of the 1st respondent in writing to so part with the possession of the premises in favour of the 2nd respondent for running the institute. Under those circumstances, clearly a case of sub letting has been established in this case. On a careful consideration of the evidence, the authorities below have concurrently found, as a fact, that the petitioner had committed wilful default in the payment of rents from June 1981 onwards and that he had also without the consent in writing of the 1st respondent sublet the premises to the 2nd respondent. Those conclusions of fact are amply supported by the materials on record and as pointed out by the Supreme Court in *Sri Rajalakshmi Dyeing Works and others* v. *Ramaswamy Chettiar*, (1980) 2 R.C.J. 165: A.I.R. 1980 S.C. 1253 concurrpnt findings of fact supported by evidence ought not to be interfered with in the exercise of the revisional jurisdiction under section 25 of the Act. All the sumissions raised by the learned counsel for the petitioner having failed, this civil revision petition is dismissed with costs.

Ratnam. J.—The learned counsel for the petitioner praya that the petitioner may be granted some time to vacate and hand over vacant possession of the premises in his occupation to the firstrespondent and the learned counsel for the firat respondent agrees to give three months' time for that purpose. Besides, the learned counsel for the firat respondent also brings to the notice of the Court that the petitioner

is in arrears of rent to the tune of Rs. 970, and prays that suitable sufeguards must be made in regard to such arrears. Taking this late account, the petitioner is granted three months' time from today to vacate and hand over vacant possession of the premises to the first respondent, subject to the condition the petitioner pays to the first respondent or deposits to the credit of R.C.O.P. No. 96 of 1981, Rent Controller's Court, Tirupathur the sum of Rs. 970 within two weeks from this day and also files an affidavit undertaking that he would vacate at the end of three months, time before this Court within the same time. If the petitioner fails to comply with any one of these conditions, the order of eviction can be put into execution forthwith.

R.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ratnam, J.*

Malayappa Nadar .. *Petitioner**

v.

Masjid E. Haferezish, by Secretary Mohamed Iqbal .. *Respondent.*

(*A*) *Tamil Nadu City Tenants' Protection Act (III of 1922), section 9—Lessee of wakf land belonging to a Masjid—Tenant whether entitled to claim any compensation for the building put up by him in case of ejectment—Land whether* res extra commercium.

(*B*) *Words and Phrases*—Res extro commercium.

In this case, there was no dispute that the petitioner had been in execlusive possession, occupation and enjoyment of the disputed property for over 40 years as lessee under the responpent Masjid. The respondent could not have, therefore, been using the land either for its purpose or for its benefit. The mere circumstance that the property in question is next or contiguous to the mosque will not by itself make it *res extra commercium*. The documents show that the immediate adjacent property formed the subject-matter of an application under section 9 of the City Tenants' Protection Act. This has not been referred to at all. In this case vital pieces of oral or documentary evidence have not been taken into account and their evidentiary value assessed and that had led the appellate Court to come to an erroneous conclusion regarding the character of the property forming the subject-matter of the application under section 9 of the Act as if it is *res extra commercium*. In order to precisely ascertain the character as the property, it would be necessary to consider in detail the features of the property in the occupation of the petitioner particularly whether it is cut off or excluded from the mosque portion of the property by walls or fences, as the case may be. The mere existence of a closed door-way or the opening out of windows would not be decisive of the question if the property in the occupation of the petitioner had not been put to use by the mosque for its benefit and its purposes along with its other lands, as in such a case, it cannot be called appurtenant to the mosque. Inasmuch as these aspects have not been referred to or consiered by the appellate Court, its conclusion that the property in the occupation of the petitioner was *res extra commercium* cannot be sustained and it is set aside with a direction to consider the question afresh. [*Para.* 4]

Cases referred to:—

Palani Roman Catholic Mission through Rev. Father A. Kulandiswamy v. *Murugan & Company*, 97 L.W. 74; A.I.R. 1984 Mad. 129; *Sambandan Ghetti* v *St. Francies Xaviers Church*, (1973) 2 M.L.J, 2: 86 L.W. 516.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of Small Causes (Chief Judge), Madras dated 24th November, 1983 and made in E.A. No. 11 of 1982 (M.P No. 2265 of 1975 in Ejt. P. No, 179 of 1975 Court of Small Causes (4th Judge), Madras.

M.R. Narayanasamy for *C. Lakshminarain*, Adovacate, for Petitioner.

The Court made the following

ORDER.—The tenant is the petitioner. The property in disputed measured 77' X 21' in No. 48, Strahans Road, Madras-12. Admittedly, this property belongs to the respondent Masjid. In ejectment suit No. 179 of 1975, the respondent herein prayed for a decree against the petitioner directing him to

*C.R.P. No. 690 of 1984. 7th July, 1984

vacate and deliver vacant possession of the the property in his occupation. After the service of summons in thatsuit, the petitioner herein filed M.P. No. 2265 of 1975 claiming benefits under section 9 of the Tamil Nadu City Tenant's Protection Act (hereinafter refre red to as the Act). Two objections were raised by the respondent in that application. The first was that as per G.O. Ms. No. 1252, Commercial Taxes and Religious Endowments, dated 27th November, 1980, a lessee of wakf land will not be entitled to claim any compensation for any building put up by him while surrendering possession of the land to the wakf and since no compensation is payable in respect of the superstructure, the tenant cannot also seek the benefits of section 9 of the Act. The second was that the land in question being part of mosque would partake the character of *res extra commercium* and therefore inalienable and cannot form the subject-matter or an application under section 9 of the Act.

2. Before the Court below on behalf of the petitioner Exhibits P-1 to P-23, were marked and the petitioner and another Civil Engineer were examined as P.W. 1 and P.W 2, while, on behalf of the respondent Exhibits D-1 to D-7 were filed and D.W. 1 and D.W. 2 have given evidence. The learned IV Judge, Court of Small Causes, Madras on a consideration of the oral as well as the documentary evidence found that the G.O. relied on by the respondent cannot be pressed into service to deprive the petitioner of the rights under section 9 of the Act and having regard to the use of the property in dispute by the petitioner as a firewood depot for nearly 40 years and the sale of an adjacent property to one Alwar Nadar under section 9 of the Act. Section 9 of the Act would apply even with reference to the property in dispute In that view, the application filed by the petitioner claiming the benefits of section 9 of the Act was allowed and a commissioner was appointed to value the land. Aggrieved by this, the respondent herein preferred Ejectment Appeal No. 11 of 1982 before the Chief Judge, Court of Small Causes, Madras. With reference to the plea raised by the respondent that G.O.M.S. No. 1252, Commercial Takes and Religious Endowment dated 27th November, 1980 would apply to deprive the petitioner of the benefits of Section 9 of the Act, the appellate Court was of the view that the rights available under section 9 of the Act cannot be defeated by the G.O. and that the petitioner can claim such benefits. However, the appellate Court was of the view that the property in question is a *res extra commercium* and inalienable and therefore, the petitioner cannot claim that such property should be sold to him under section 9 of the Act. In that view. the appeal was allowed and the application filed by the petitioner claiming the benefits under section 9 of the Act was dismissed. It is the correctness of this order that is challenged in this civil revision petition.

3. The learned counsel for the petitioner contends that the appellate Court was in error in having concluded that the property in dispute would be *res extra commercium* and pointed out that in order to be land appurtenant to the mosque, the land should also have been used by the mosque for its benefit. Relience in this connection was also placed upon the meaning of the word "appurtenant" as given in Black's Law Distionary, 5th edition at page 94. The learned counsel further pointed out that the evidence on behalf of the respondent disclosed the requirement of the property in the occupation of the petitioner for its own purposes and that having regard to the exclusive use of the property by the petitioner as a firewood depot for nearly 40 years, it could not have been used at all by the respondent as an appurtenant land and the mere requirement of the respondent for its own purpose would not render the property inalienable as *res extra commercium*. Though the respondent in this revision petition had been served, it had not appeared either through an advocate or by any other person duly authorised.

4. In considering the question whether the property in dispute is appurtenant to the mosque, the appellate Court has not adverted to the requirements to be satisfied or fulfilled before such property can be really termed as an appurtenant one. In this case, there is no dispute that the petitioner has been in exclusive possession, occupation and enjoyment of the disputed property for over 40 years as a lessee under the respondent. The respondent could not have, therefore, been using the land either for its purpose or for its benefit. The mere circumstance that the property in question is next or contiguous to the mosque will not by itself make it *res extra commercium*. Indeed it is seen from

the documents that tfie immediate adjacent property formed the subject-matter of an application under section 9 of the Act at the instance of one Alwar Nadar ano this is shown by Exhibits B-6. Uufortunately, there is no reference in the order of the aopellate Court to Exhibits B-6. at all. Besides, the admission of D.W. 1, the photographer, who had taken the photographs Exhibits D-3 and D-4, would show the existence of a wall between the mosque and the property in the occupation of the petitioner. Even D.W. 2 states in the course of his cheif-examination that there is a wall in between the property leased out to the petitioner and the mosque. P.W. 1 also in the course of his chief-examination has stated that there is a well in existence between the property leased out to him and the mosque land and in the course of his cross-examination, he has reiterated the existence of the compound wall by stating that the property in his possession is on one side of the wall. P.W. 2 would also state in his chief-examination that there is an intervening wall between the mosque and the property in the occupation of the petitioner. The evidence of P.W. 1 and P.W. 2 and D.W. 1 and D.W. 2 referred to above would thus disclose the existence of a wall between the property in the possession and enjoyment of the petitioner and the mosque and if that be so, then, the property in the occupation of the petitioner could not have been used by the respondent for purposes of the mosque for its benefit. That is also probable in view of the admitted exclusive eccupation and enjoyment of the property in dispute by the petitioner as a lessee for more than 40 years. The report of the Commissioner has not been properly considered and appreciated. The bulk of the report of the Commissioner is devoted to physical features of the building *viz.*, the mosque, which was really unnecessary for purposes of considering the application of the petitioner under section 9 of the Act taking into account the character of the property forming the subjectmatter of such an application, Towards the concluding portion of the report, the Commissioner has stated that the western side wall divided the mosque and the respondent's (petitioner herein) portion, that the Mosque and the respondent's (petitioner herein) portion had separate main entrances and that there was no door-way outside the western wall. Recently in *Palani Roman Cotholic Mission through Rev. Father A. Kulandaiswamy* v. *Murgan & Co.*, (1984) 97 L.W. 74: A I.R. 1984 Mad. 126, I had occasion to examine the question of the applicability of section 9 of the Act to certain properties owned by a church claimed by it to be appurtenant to the church. In doing so, a decision of this Court in *Sambandan Chetti* v. *St. Francias Xaviers Church*, (1973) 2 M.L.J. 2: (1973) 56 L.W. 5167 was referred to and it was held that there was clear demarcation of the church and its appurtenant properties by compound walls and fence the property which formed the subject-matter of the application under section 9 of the Act cannot be considered to be a property appurtment to the church. The decision in *Sambadhan Chetti* v. *St. Francts Xavier's Church*, (1973) 2 M.L.J. 2: 56 L.W. 5167 was held to be inapplicable the facts as in that case it was found that the property forming the subject matter of the application under section 9 of the Act was within the church compound itself, which cannot be the case in *Palani Roman Catholic Mission through Rev. Father A. Kulandaismway* v. *Murugan & Co.*, (1984) 97 L.W. 74: A.I.R. 1984 Mad. 126. In order therefore to ascertain the true character of the property whether it is really appurtenent to the church or is otherwise clearly demarcated therefrom by compound walls and other fences or ridges, it would be necessary to record a clear finding of fact touching upon that aspect on the basis of the materials made available to the Court. In this case, as seen earlier vital pieces of oral as well as documentary evidence have not been taken into account and their evidentiary valueassessed and that had led tothe appellate Court to come to an erroneous conclusion regarding the character of the property forming the subject-matter of the application under section 9 of the Act that is *res extra commercium*. In order to precisely ascertain the character of the property, it would be necessary to consider in detail the features of the property in the occupation of the petitioner particularly whether it is cut off or excluded from the mosque portion of the property by walls or fences, as the case may be. The mere existence of a closed doorway or the opening out of the windows would not be decisive of the question, if the property in the occupa-

tion of the petitioner had not been put to use by the mosque for its benefit and its purposes along with its other lands, as in such a case, it cannot be called appurtenant to the mosque. Inasmuch as these aspects have not been referred to or considered by the appellate Court, its conclusion that the property in the occupation of the petitioner is *res extra commercium* cannot be sustained and has to be set aside with a direction that question should be considered afresh in the light of the observations contained in this order and also the available evidence on record. Consequently, the civil revision petition is allowed and the order of the appellate Court dismissing M.P. No. 2265 of 1975 filed by the petitioner under section 9 of the Act is set aside and Rejectment Appeal No. 11 of 1982 is remitted to the lower appellate Court for a reconsideration on its merits and in the light of the observations contained herein. There will, however, be no order a sto costs.

R.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT;—*V. Ramaswami and David Annoussamy, JJ.*

Maimoon Bi .. *Appellant**

v.

United India Insurance Co., Ltd. Madras and another .. *Respondents.*

Motor Vehicles Act (IV of 1939), Transfer of a motar vehicle—Entry of transfer not made in the registration certificate—Policy of insurance not transferred—Vehicle involved an accident—Victim run over by lorry—Heirs of the deceased making claim for compensation—Insurance company avoiding claim—Burden of proof regarding ownership of the vehicle lies on the Insurance company.

A claim for compensation was filed by the heirs of the victim run over by a lorry. The Insurance Company was made the first respondent, the transferee in whose favour the vehicle was transferred was made the second reepondent, and the lorry owner in whose name the insurance stood was made the third respondent. The policy had not been transfered and the registration of the vehicle stood only, in the name of the third respondent. The tribunal had held the second respondent alone liable and dismissed the claim against the other two respondents. The claimants appealed seeking relief against the latter also.

Held: —In this case there is no evidence to show when the lorry was sold and whether the second respondent purchased it at all from the third respondents. In these circumstances it cannot be said that there was any transfer at all which will stand in the way of the claimant. If the Insurance Company wanted to extricate itself from the liability on a special plea that the policy was not in the name of the owner, it should have pleaded and proved by showing that the third respondent had transferred the vehicle when the accident took place and that having not been done it is not open for the Insurance Company to deny its liability. The burden is certainly on the Insurance company to prove that the third respondent was not the owner on the date of the accident and that the Insurance Company having failed to do so they have to suffer the liability. [*Para.* 3].

Cases referred to:—

N. Boopathy v. *M.S. Vijayalakshmi*, 1955 A.C.J. 1 ; *South Indian Insurance Co., Ltd.* v. *Lakshmi* (1971) 2 M.L.J. 354: 1971 A.C.J. 122: 84 L.W. 147: A I.R. 1971 Mad. 347 ; *Hema Ramaswami* v. *K.M. Valarence Panchami*, (1981) 1 M.L.J. 182: I.L.R. (1981) Mad. 224: 1981 A.C.J. 288: 94 L.W. 142. A.I R. 1981 Mad. 174.

Appeal against the Order of the Motor Accidents Claims Tribunal (Sub-Court) Chingleput, dated 23rd November, 1982 and made in M.O.P. No. 309 of 1981.

N. Ganapathi and *Sellamobyiran*, for Appellant.

A. *Devanathan*, for 1st Respondent,

The Judgement of the Court was delivered by

Ramaswami, J.—This is an appeal by the claiment is a motor accident case. The appellant is the wife of one Mohamed Ismail who met with an accident on 7th March, 1981 and died as a result of the same at the

*A.A.O.No. 188 of 1983. *5th September*, 1984.

spot. It is stated that he was standing in lorry T.M.S. No. 9097 and due to the negligent driving to the lorry by the driver he was overthrown from the lorry and then run over by the same lorry. The first respondent is the Insurance Company. The third respondent is the registered owner. The vehicle was insured with the first respondent and the policy for the same stood in the name of the third respondent. The Tribunal found that the accident happened due to rash and negligent driving of the vahicle by the driver and that therefore the claimant is entitled to compensation. The Tribunal also fixed the compensation at Rs. 36,000. The correctness of the quantum is now not is dispute. However, the Tribunal directed the second respondent alone to be liable and dismissed the claim as against respondents 1 and 3. This was on the ground that the lorry had been transferred by the third respondent to the second respondent and that the policy stood in the name of the third respondent and it had not been transferred to the second respondent.

2. We are at a loss how this conclusion could have been reached by the Court below at all. None of the parties produced the registration certificate in order to show in whose name the vehicle was standing on the date when the accident occurred. The Tribunal purported to rely on the evidence of P.W. 1, the wife of the deceased who was the claimant and P.W. 2 who was a co-employee travelling in the lorry, in support of its finding that the second respondent was the owner of the vehicle on the day when the accident happened. The evidence extracted in the order does not in any way show that there was any valid transfer of the vehicle to the second respondent on the day when the accident took place. The only sentence which has any bearing at all on this question is the one found in cross-examination of P.W. 1 which reads as follows:—

> "My husband was working in the lorry for about 8 months prior to the accident and for the 8 months the second respondent was the owner of the lorry."

This was an inference, by the claimant. She would not be a proper witness to speak to the fact as to who was the owner of the vehicle. The proper persons are respondents 2 and 3 or even the first respondent. They have not gone into the witness box to say as to who was the owner of the vehicle when the accident took place. P.W. 2 who is stated to be the person who was travelling with the deceased on the date of the accident could not also be stated to know the transfer. Even if he had stated in cross-examination that the second respondent purchased the lorry which is involved in the accident three months prior to the date of the accident, that would not be legal evidence at all in this matter as he is not a person who had any personal knowledge of the ownership or the transfer. Nor is there any evidence to show that he was aware of the transfer for any particular reason. On the other hand, we have R.W. 1 the Administrative Officer of the Insurance Company who would not give any direct evidence as to whether there was a transfer or not. He had simply stated that it appears that the second respondent had purchased the vehicle. As to when he purchased and whether it was prior to the accident are not found in the evidence of R W. 1. On the material, therefore, there is nothing to that there was any transfer from the third respondent to the second respondent before the date of the accident. In the circumstances, therefore, we have to proceed on the basis that the third respondent was the owner and continues to be the owner.

3. The learned counsel for the Insurance Company was at pains to show that in the case of a motor vehicle, it is not necessary that there should be a transfer of the registration in order to effectuate a valid transfer and that transfer may be effected immediately by sale and purchase by delivery of possession. In support of this contention, he has relied on the decisions reported in *N. Boopathy and others* v. *M.S. Vijayalakshmi and others*, 1966 A.C.J. 1; *South Indian Insurance Company, Limited* v. *Lakshmi and others* (1971) 2 M.L.J 354: 1971 A.C.J. 122: 84 L.W. 147: A.I.R 1971 Mad. 347. and *Hema Ramaswami* v. *K.M. Valarance Panchami and others*. 1981 A C.J. 288. All these cases are irrelevant. In each and everyone of these cases it was found that there was a transfer by sale and purchase and passing of consideration. The only point taken was that the sale was dot complete till there was an endorsement in the registration certificate. It was held that the transfer does not wait till the endorsement is made

the registration certificate and that when the sale and purchase is effected and the consideration passed, the sale is complete. That is not the case here. There is no evidence to show when it was sold and whether the second respondent purchased it at all from the third respondent. In the circumstances, we are unable to say that there was any transfer at all which will stand in the way of the claimant. The net result is the third respondent will be liable for the claim and the first respondent, insurance company will be vicariously liable. As the second respondent has not questioned its liability and filed any appeal, the decree granted by the Tribunal as against the second respondent also could not be varied. The net result in that all the respondents are jointly and severally liable to pay the money to the claimant-appellant. We may also point out that the second and third respondents remained *ex parte* and they did not deny liability. The claimant who is not aware as to who is the owner of the vehicle has impleaded both the second and third respondents as parties to the claim petition. If the Insurance Company wanted to extricate itself from liability on a special plea that the policy is not in the name of the owner, it should have pleaded and proved by showing that the third respondent had transferred the vehicle when the accident took place and that having not been deny its liability. The burden is certainly on the Insurance Company to prove that the third respondent was not the owner on the date of the accident and that the Insurance Company having failed to do so they have to suffer the liability. The request of the learned counsel for the Insurance Company to give a second chance by way of a remand to the Tribunal below in order to prove whether there was a transfer or not on the date when the accident occurred, to say the least, in unresonable and unjustified and could not be entertained at this stage.

4. In the result the appealls allowed. The judgment and decree of the Tribunal is modified and there will be a decree against the three respondents jointly and severally for a sum of Rs. 36,000. The appellant will be entitled to her costs. Since respondents 2 and3 remined *ex parte* and did not contest the appeal, the costs would be paid by the Insurance Company, the first respondent.

R.S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT: *M A. Sathar Sayeed, J.*

M/s. Jayabharatham & Co, 235, **Royapettah High Road, Madras-14.** .. *Petitioner**

v.

Susila Chari .. *Respondent.*

Tamil Nadu City Tenants' Protection Act (III of 1922), section 9—Delay in filing application under section 9—No proof that delay was not intentional—Application dismissed.

(*B*) *Limitation Act (XXXVI of 1963), section* 5—*Applicability of section to the Madras City Tenants' Protection Act.*

Since under the Limitation Act, 1963, section 5 is specifically made applicable by section 29 sub-section (2) it can be availed of for the purpose of extending the period of limitation prescribed by a special or local law if the applicant can show that he had sufficient cause for not presenting the application within the period of limitation. It is only if the special or local law expressly excludes the applicability of section 5, that it would stand displaced. A petition under section 5 of the Limitation Act, 1963, is not barred to seek condonation of the delay in filing the petition under section 9 (1) of the Madras City Tenants' Protection Act.

As to the question whether the petitioner has placed relevant materials before the Court to come to the conclusion that the delay of 55 days in the instant case in filing the petition under section 9 (1) of the Act, has to be condoned under section 5 of the Limitation Act, 1963, the petitioner in his affidavit states that he contacted his counsel and counsel told him that he has to take out an application under section 9 within thirty days from the date of service of the summons and that the petitioner instructed his counsel to prepare such a petition. The counsel to whom instructions had been given, has not been examined nor the petitioner before tne trial Court to prove as to how he was prevented from filing the petition

*C.P.R. No. 1404 of 1984. 25th *September, 1984.*

within time as required under section 9 (1) of the Act. The petitioner has also not satisfactorily explained why after the receipt of summons on 20th January, 1982, he was keeping silent for such a long time without filing the petition under section 9 (1) of the Act. Though the petitioner has averred that he was suffering from jaundice, it is not mantioned in the affidavit as to where and under whom he was undergoing treatment. No medical certificate has been filed in Court or marked to show that the petitioner was suffering from jaundice. There are no *bona fides* in the petition and the petitioner has not satisfactorily proved, that the delay in filing the petition was not intentional, but due to reasons beyond his control. The trial Court has rightly come to the conclusion that the petitioner has not established that there is sufficient cause for condoning the delay of 55 days. There is no flaw in law committed by the trial Court to warrant interference in this revision.

[*Paras.* 8 *and* 9.]

Cases referred to:—

Govindaswamy v. *Bhoopalan*, (1977) 2 M.L.J. 206; *Angaiyaraja* v. *Alaguraja*, (1976) 2 M.L.J. 80: I.L.R. (1976) 1 Mad. 247: 89 L.W. 362: A.I.R. 1977 Mad. 142; *Manga Ram* v. *Delhi Municipality*, (1976) M.L.J. (Crl.) 206: (1976) 2 S.C.R. 392: 1976 Crl. L.J. 179; A.I.R. 1976 S.C. 105.

The Advocate-General for *A.S.A. Tajuddin* for Petitioner.

K.G. Rajappa, for Respondent.

The Court delivered the following

ORDER: The above revision is filed questioning the correctness of the order of the IX Assistant Judge, City Civil Court, Madras, made in I.A. No. 7646 of 1982 is O.S No. 9499 of 1981 on 22nd February, 1984.

2. The short facts of the case are as follows:—The respondent is the landlord with respect to the land bearing No. 181 L (New No. 235). Royapettah High Road, Madras-14. The petitioner is the tenant under the respondent paying a monthly rent of Rs, 325. The landlady filed O.S. No. 9499 of 1981 against the petitioner seeking their ejectment from the suit property and also claiming damages at Rs. 1,200 for the past and damages for the future at Rs. 600 per mensem. Pending disposal of the suit, an affidavit was filed by one of the partners of the petitioner-firm under section 9 (1) of the Madras City Tenents' Protection Act seeking purchase of the property which is in his possession. Another Interlocutory application I.A. No. 7645 of 1982 in O.S. No. 9499 of 1981 was filed by one of the partners of the petitioner-firm seeking condonation of the delay of 55 days under S. 5 of the Limitation Act, 1963 in filing the petition under S. 9 of the Madras City Tenants' Protection Act, contending that the petitioner is in possession of the property bearing door No 235, Royapettah High Road, Madras-14 measuring 1424 sq., it., situate in R.S. No. 1137. What was leased out to the petitioner was only a vacant land and the petitioner has put up constructions over the land and completed the same in the year 1954 which bears Door No. 235, Royapettah High Road, Madras-14. Though the original lease expired on 30th September, 1974, the same was renewed subsequently by enhancing the rate of rent to Rs. 326 per month from 1st November, 1974. It was further averred in the affidavit filed by one of the partners of the petitioner firm, who was the defendant in the suit, that he—

"has already taken out an application under section 9 for a direction to sell the land to the defendant. The summons was served in the above suit on 20th January, 1982. I am not well versed with Court procedure. As the hearing of the suit was on 6th March, 1982, I contacted my counsel on 19th March, 1982. Of course my counsel told me that I have to take out an application under section 2 within 30 days from the date of the service of summons. In fact I instructed my counsel to prepare petition for that purpose. Immediately I had to leave for my business tour of Belgaum and Mysore. Unfortunately, I was held up in my business tour and I returned to Madras only in the third week of March, 1982. But I could not contact my couusel immediately as I had jaundice and I was advised bed rest for four weeks. Only now am I able to contact my counsel and signed the affidavit

Now there is a delay of 55 days which is neither wilful nor wanton due to the above circumstances."

3 A counter was filed by the landlady respondent herein opposing the petition for condonation of delay, Several points were raised regarding the maintainability of the petition and she contended that the tenant is not entitled to seek the benefits under the Act. *Inter alia*, it was contended by the landlady that the petition has not been filed by the tenant-petitioner within thirty days to purchase the land as enjoined under the Act, and therefore the petitioner is not entitled to seek benefits under the Act. It was further contended that the right of the yetilioner to purohase the land has been lost by efflux of time under section 9 (1) of the Act, and section 5 of the Limitation Act, 1963 is not applicable to the petitioner. The other several allegations in the affidavit that the petitioner went for his business tour, etc., were denied,

4. The Court below dismissed the petition to condone the delay holding that the petition is not maintainable, since it is filed beyond time. It is against the dismissal of the petition, the above revision is filed by the tenant.

5. The question that requires consideration in this revision is, whether the petition to condone the delay in filing the petition under section 9 of the Madras City Tenants Protection Act is maintainable and if so, whether such a petition to condone the delay can be filed under section 5 of the Limitation Act, 1963.

6. Under section 9 (1) (a) (i) of the Madras City Tenants' Protection Act, 1922, as amended, any tenant who is entitled to compensation under section 3, and against whom a suit in ejectment has been instituted by the landlord, may, within one month after the service on him of summons, apply to ths Court for an order that the landlord shall be directed to sell for a price to be fixed by the Court, the whole or part of, the extent of land specified In the application. For a person to claim the benefits under section 9 (1) (a) (i) of the Act, he must be a tenant as defined in the Act, he must be entitled to compensation under section 3 of the Act and against such person ejectment proceedings should have deen instituted by the landlord. In such a case, the tenant within one month after the service on him of the suit summons apply to the Court for an order that the landlord shall be directed to sell so much of the land under his possession for his convenient enjoyment for a price to be fixed by the Court

7. The entire scheme of the Madras City Tenants' Protection Act, 1922, as amended is, to afford protection to a tenant who has constructed a building on another's land with the fond hope that he wonld not be evicted. When once it is found that the person iu occupation is a tenant and his tenancy is governed by the provisions of the City Tenants' Protection Act at the relevant point of time, the mere increase in the rents subsequently does not necessarily create a new tenancy as to deprive the tenant of the benefits under the Act. The legislative intent behind the conferring of right on the tenant to purchase the land. if he is the tenant at the relevant point of time, is to make the tenant the owner of the land since he has put up the superstructure of his own over the land. But in case the tenant is not the owner of the superstructure on the date when the suit is filed, the application by the tenant to purchase the land is incompetent and consequently the tenant will not be entitled to any relief under section 9 of the Madras City Tenants' Protection Act. In so far as the instant case is concerned, the right to purchase the land is clafmed by the tenant and even though the contention of the landlady is that the petitioner is not the tenant, from the avermenrs made in the affidavit and the counter-affidavit, it is represented that even after the termination of the tenancy, the petitioner is the tenant and he could not be denied the right of protection under the Act. In so far as the instant case is coccerned, an ejectment suit has been instituted by the landlady again t the petitioner and the summons of the suit have been served on the tenant. But the tenant has not taken out an application as required under section 9 (1) of the Act, within one month after the service on him of the suit summons, seeking a direction from the Court to the landlady to sell the land to the tenant. It is at this stage relevant to note certain dates. The suit O.S. No.

9499 of 1981 was filed against the petitioner on 15th December, 1981. Summons were served on the defendant on 20th January, 1982. 30 days as required under S. 9 (1) of the Act expired on 19th February, 1982. The suit was posted for hearing on 6th March, 1982. On 15th April, 1982, a petition under S. 9 (1) of the Act to purchase the land was filed, and on the same day I A. No. 7646 of 1982 was filed seeking condonation of delay under S. 5 of the Limitation Act, 1963. The reason given by the petitioner for not filing the petition in time as required under the Act was that he was not well-versed with the Court procedure and since he had gone on business tour to Belgaum and Mysore he could not file the application in time. The trial Court disbelieved the contention of the petitioner and dismissed the petition.

8. Learned Advocate-General, who appeared on behalf of the petitioner, rested his arguments on two points. Firstly a petition under S. 5 of the Limitation Act, 1963 to condone the delay is maintainable in a case where the tenant has not filed a petition within thirty days under S 9 (1) of the Madras City Tenants' Protection Act. Secondly, it was contended that there is sufficient cause shown in the affidavit for not filing the petition in time as required under S. 9 (1) of the Act and the dismissal of the petition by the trial Court is contrary to law and erroneous on the facts of the case. In so far as the first contention is concerned, the learned Advocate-Ceneral reliee on a decision of V. Ramaswami, J., reported in *Govindaswami* v. *Bhoopalan*,[1] and of Kailasam, J., as he then was, reported in *Angaiyaraja* v. *Alagaraja*,[2] and contends that a petition under S. 5 of the Limitation Act, 1963 is maintainable to condone the delay under S. 9 (1) of the Madras City Tenants' Protection Act. Learned Advocate-General has also brought to my notice a decision reported in *Manga Ram* v. *Delhi Municipality*[3]. That was a case arising under section 417 of the Criminal Procedure Code. On the basis of this decision, learned Advocate-General contended that where a petition under S. 9 (1) of the Madras City Tenants' Protectico Act has not been filed in time by the tenant and if the tenant is satisfactorily able to prove the delay in not filing the petition within time as required under the Act, each day's delay can be condoned under S. 5 of the Limitation Act, 1963. The Supreme Court in the aforesaid decision has observed as follows: —

> "There is no important departure made by the Limitation Act, 1963 in so far as the provision contained in section 29. sub-section (2) is concerned. Since under the Limitation Act, 1963, section 5 is specifically made applicable by S. 29, sub-section (2), it can be availed of for the purpose of extending the period of Limitation prescribed by a special or local law if the applicant can show that he had sufficient cause for not presenting the application within the period of limitation. It is only if the special or local law expressly excludes the applicability of section 5 that it would stand displaced."

In view of the desision of the Supreme Court and the decisions of our Court mentioned supra, I have to hold that a petition under section 5 of the Limitation Act, 1963 is not barred to seek condonation of the delay in filing the petition under section 9 (1) of the City Tenants' Protection Act. The contention of the learned Advocate General that a petition can be filed under section 5 of the Limitation Act, 1963 to condone the delay in filing a petition under S. 9 (1) of the Madras City Tenants' Protection Act, is well-founded and sustainable.

9. The other question now remains whether the petitioner has placed relevant materials before the Court to come to the conclusion that the delay of 55 days in filing the petition under section 9 (1) of the Act, has to be condoned under section 5 of the Limitation Act, 1963. The petitioner in his affidavit states that he contacted his counsel and the counsel told him that he has to take out an application under section 9 within thirty days from the date of service of the summons. The petitioner instructed his counsel to prepare such a petition. But the counsel to whom instruction have been given, has not been examined nor the petitioner himself was examined before the trial Court to prove as to how he was prevented from filing the petition within time as required under section 9 (1) of the Act. The petitioner has not gone the witness box nor has he

1. (1984) 2 M.L.J. 206.
2. (1976) 2 M.L.J. 80: 89 L.W. 362: I.L.R. (1979) 1 Mad. 247: A.I.R. 1977 Mad. 142.
3. (1976) 1 S.C.J. 237: (1976) M.L.J. (Crl.), 206: (1976) 2 S.C.R. 260: (1976) 1 S.C.C. 392: 1976 Cr. L.J. 179: A.I.R. 1976 Mad. 105.

proved or satisfactorily explained as to when he left Madras for business tour to Belgaum and Mysore and when and on what day or date he returned in March, 1982 from such tour.

The petitioner has also not satisfactorily explained that after the receipt of summons on 20th January, 1982, why he was keeping silent for such a long time in not filing the petition under section 9 (1) of the Act. Though the petitioner has averred that he was suffering from jaundice, it is not mentioned in the affidavit as to where and under whom he was undergoing treatment. No medical certificate has been filed in Court or marked as an exhibit nor do I find any such medical certificate in the same bundle of the Court showing that the petitioner was suffering from jaundice. A reading of ths affidavit filed by the petitioner clearly shows that there are no *bona fides* in the petition and the petitioner has not satisfactorily proved that the delay in filing the petition was not intentional, but due to reasons beyond his control. No evidence of any sort was adduced or placed before the trial Court to come to the conclusion that the petitioner had sufficient cause in not filing the petition under section 9 (1) of the Act within thirty days from the date of receipt of suit summons. The trial Court has gone into this aspect and has rightly come to the conclusion that the petitioner has not established that there is sufficient cause for condoning the delay of 55 days. I am of the view that it is on this ground the order of the trial Court has to be sustained, that there is no flaw in law committed by the trial Court to warrant interference in this revision and that this revision has to be dismissed and it is accordingly dismissed. However, there will be no order as to costs.

R.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Maheswaran, J.*

The Musiri Co-operative Land Development Bank Ltd., by the Special Officer ... *Appellant**

v.

Ranganathan and others .. *Respondents.*

Tamil Nadu Co-operative Societies Act (LIII of 1961), section 100—Employee of a co-operative society dismissed from employment—Suit by the employee challenging dismissal—Contention that the order of dismissal is void, illegal, violating the principles of natural justice—Defect and infirmity in the enquiry going to the root of the order—Suit competent.

Held:—In this case there was no dispute that the documents of enquiry under section 65 of the Tamil Nadu Co-operative Societies Act were not furnished to the plaintiff. But it was not clear whether during the enquiry under section 65 of the Act, the plaintiff himself was examined by the enquiry officer. There are no records produced in this case to show the terms of reference in respect of the enquiry under section 65. It cannot therefore be said that the non-furnishing of copies of enqufry under section 65 would have prejudiced the plaintiff, but it shall be borne in mind that both the Courts held that the domestic enquiry ofiicer acted without jurisdiction not merely because be had not furnished the copies of documents of the enquiry under section 65, but for other reasons also such as violation of principles of natural justice in not giving an opportunity to the plaintiff, examining the witness in his absence and passing an *ex parte* order even when he had asked for an adjournment. In these circumstances the defect in the enquiry proceedings goes to the root of the order and makes it in law void, As such the suit by the plaintiff is quite competent and not barred under section 100 of the Tamil Nadu Co-operative Societies Act 53 of 1961. [*Paras.* 7,8]

Cases refered to:—

Madurai District Co-operative Supply and Marketing Society Ltd. v. *Sankaranarayanan*, (1982) 1 M.L.J. 140: 95 L.W. 178;

* S.A. No. 894 of 1984. 19*th October*, 1984.

K. Satyanarayana v. *Motu Industries*, (1963) 1 An W.R. 323 (D.B.); *Firm and Illuri Subbayya Chetty & Sons* v. *The State of Andhra Pradesh*, (1963) 2 S.C.J. 725: (1964) 1 M.L.J. (S.C.) 5: (1964) 1 An. W.R. (S.C.) 5: (1964) 1 S.C.R. 752: (1963) 50 I.T.R. 93: A.I.R. 1964 S.C. 322; *Secretary of State* v. *Mask & Company*, (1940) 2 M.L.J. 140 (P.C.) : 67 I.A. 222: I.L.R. (1940) Mad. 599: 52 L.W. 1 (P.C.): A.I.R. 1940 P.C. 105.

P.K. Jamal Mohamed, for Appellant.

K. Duraisami, for Respondents.

The Court delivered the following

JUDGMENT—The third defendant is the appellant. The suit out of which this second appeal arises was filed by the first respondent for declaring that the order of the third defendant, dated, 10th November, 1979 and the order of the second defendant, dated 29th March, 1980 and also the order of the third defendant, dated 6th May, 1980 are *ab initio* void, illegal, without jurisdiction and *ultra vires* and for a permanent injunction restraining the defendants from enforcing the said orders.

2. The plaintiff-first respondent was the Secretary of the third defendant-Co-operative Land Development Bank at Musiri. Disciplinary action was taken against the plaintiff and charges were framed against him for certain acts of omission and commission on the part of the plaintiff. The third defendant appointed an Enquiry Officer and on the basis of his report dismissed the plaintiff on 10th November, 1979. On appeal preferred by the plaintiff, the second defendant, Deputy Registrar of Co-operative Societies, Musiri, set aside the order of dismissal, he remitted the matter for disposal *de novo*. But the third defendant again passed an order dismissing the plaintiff from service. According to the plaintiff the order of the third defendant (1) is *ab initiio* void, (2) is vitiated by violation of the rule of *audi alteram partem* (3) is *mala fide* as no show-cause notice was issued prior to framing of charges; (4) is vitiated as the punishment by the first defendant is without enquiry, (5) is bad as the order was based on the report of the Enquiry Officer, a member of the Musiri Bar, who was appointed by the third defendant and who has not furnished him with details asked for by him. The further contention is that the order of the second defendant is vitiated as no notice or summons was issued by the second defendant and the appeal was disposed of summarily and the order is also bad as the second defendant has no jurisdiction to remit the matter once he is convinced that the order of the third defendant has to be set aside. It is in those circumstances that the plaintiff prayed for the reliefs extracted.

3. The suit was resisted by the defendants. The second defendant in his answer contended that the allegation that the second defendant has no jurisdiction to remit the matter is wrong and that the order of remit has been made according to the provisions of the by laws of the Land Development Bank and that the suit is bad for want of notice under section 80, Civil Proceedure Code and it is also barred undee section 100 of the Tamil Hadu Co-operative Societies Act. The first defendant adopts the written statement of the second defendant. The third defendant would deny the allegation of *mala fides*. He also denied that the Special Officer was exhibiting a hostile attitude towards the plaintiff. He stated that the Enquiry Officer appointed by the third defendant summoned the plaintiff to appear on 7th August, 1979 and on 16th August, 1979, that as he has not appeared, he has proceeded *ex parte* and that the allegation that no enquiry was conducted by the Enquiry Officer is wrong. The third defendant also denied the allegation that the documents were withheld from the plaintiff and stated that the suit is also bad for want of notiee.

4. The trial Judge was of the view that the suit will not be barred by section 100 of the Co-operative Societies Act, 1961 and therefore the Court has jurisdiction to try the suit and that the order of the defendants are void and therefore the plaintiff is entitled to the injunction prayed for. The appellate Court has merely followed the judgment of the trial Court and confirmed the judgment of the trial Court. This appeal is preferred by the third defendant.

5. A learned Judge of this Court while admitting the second appeal framed the following subtsantial questions of law:

1. Whether the suit out of which the second appeal arises, is maintaininable in a civil

Court in the face of section 100 of the Tamil Nadu Act 53 of 1961, as it specifically says that in case of any order or award passed or decision or action taken by the authorities under the Act, including the Government, the same cannot be questioned in any Court law? and

2. Whether the failure of the appellant to produce the records of investigation made by the Registrar under section 65 of the Co-operative Societies Act' which is not in his possession, will vitiate the enquiry before the Enquiry Officer?

6. It is only on these two points that the decisions of the Courts below are challenged. The question whether the suit by an employee oi a Co-operative Society against the Society challenging the order of dismissal passed by the Society, is barred by the provisions of sectiou 100 of the Tamil Nadu Co-operative Societies Act, 53 of 1961 is bereft of direct authority *Madurai District Co-operative Supply and Marketing Society Ltd*. v. *Sankaranarayanan*[1] was a case where the plaintiff in each of the four suits was an employee of the Madurai Co-operative Supply and Marketing Society. Each of them was in charge of godowns of the Society storing foodgrains. After a domestic enquiry, all of them were dismissed as there was a shortage in the stock and a suit was filed by each of them. A learned single Judge of this Court took the view that the suit filed by the dismissed employee of the Co-operative Society against the Society must be held to be maintainable and not barred by the Industrial Disputes Act. According to the learned Judge, the issue as to maintainability of the suit vested with the Corut on two different statutory provisions. One was under section 73 read with section 100 of the Tamil Nadu Co-operative Societies Act andthe other was under the Industrial Disputes Act, 1941. The learned Judge pointed out that no argument, however, was addressed before him by the counsel for the Society on the basis of section 73 of the Tamil Nadu Co-operaiive Societies Act. It is not clear from the judgment whether the bar under section 100 of the Tamil Nadu Co-operative Societies Act was argued before the learned Judge. In those circumstance, the learned Judge held that the suit filed by the employee must be held to be not barred by the Industrial Disputes Act. This ruling is of no help.

7. Section 100 of the Tamil Nadu Co-operative Societies Act runs thus :

> "No order or award passed, decision or action taken or direction issued under *this* Act by an arbitrator, a liquidator, the Registrar or an officer authorised or empowered by him, the Tribunal or the Governmedt or any officer subordinate to them, shall be liable to be called in question in any Court."

It is not disputed that section 73 of the Tamil Nadu Co-operative Societies Act is not attracted as disputes arising out of dlsciplinary action by the Society or its committee against the paid servants of the Society are specifically excluded by section 73. Learned counsel for the appellants invited my attention to the ruling in *K. Satyanarayanan* v. *Motu Industries*[1] where a Division Bench of Andhra High Court had to deal with secction 48 of the Madras Co-operative Societies Act, VI of 1932, which corresponds to section 100 of the present Act 53 of 1961. This was a case where the Godavari Central Co-operative Stores (in liquidation) (first defendent in that suit) obtained a decree against one Satyanarayanamurthi (the third defendant and judgmene-debtor) before the Registrar of Co-operative Societies in a claim. The said Society brought the house belonging to the judgment-debtor, namely, Satyanarayanamurthi to sale and one K. Satyanarayana the first defendant, purchased it and the sale was confirmed by the Registrar One Motu Industries Private Limited, one of the several creditors of the judgement-debtor, was the plaintiff. Godavari Central Co-operative Stores, after realising the amount went into liquidation. Motu Industries, one of the creditors of the judgment-debtor, without obtaining sanction of the Registrar, brought a suit against the Co-operative Stores and the judgment-debtor, challenged the decree obtained by the Co-operative Stores and the sale held in execution on the ground that the Depuy Registrar had no jurisdiction to entertaint the claim and the execution proceedings were vitiated by fraud and irregularity. The question in that case was whether the suit for setting aside the

1. (1982) 1 M.L.J. 140; 95 L.W. 178.

1. (1963) 1 An.W.R. 323 (D.B.).

sale was barred and whether the leave of the Registrar for proceeding with the application is a condition precedent for the institution of the suit. On these two questions, the Bench held that it is not open to the plaintiff to challenge the correctness of the award passed under S. 51 of the Madras Co-operative Societies Act, 1932 or the sale held in pursuance of the said award and that section 51 (6) of Act VI of 1932 expressly bars the jurisdiction of civil and revenue courts to call in question the decision under section 51. It was held that failure to obtain sanction of the Registrar for institution of the suit is fatal to its maintainability. The trial Court found in that case that award proceedings taken out by the Society before the Deputy Registrar were invalid, that the sale in pursuance of the decree is also a nullity and that the plaintiff can maintain the suit in civil court for declaration that the sale is void and the civil court has jurisdiction to entertain the suit and ultimately granted a decree. In that case, the High Court, as a fact, found that—

> "It has not been alleged, much less proved in the instant case that any of the provisions of the Act had not been complied with or that there has been a violations of any principles of judicial procedure".

It is in those circumstances and in view of certain authorities cited before it, that it came to the conclusion that the suit for declaration that the sale is void and is not binding on the plaintiff, is barred by the provisions of Act VI of 1932 and is not maintainable. The question about the exclusion of jurisdiction of civil courts to entertain civil actions by virtue of specific provisions contained in the Act has been judicially considered in *Secretary of State* v. *Mask & Company*[1] Lord Thankerton observed:

> "It is settled law that the exclusion of the jurisdiction of the civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the civil Courts have jurisdiction to examine into cases whether the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

What is contended before me by the learned counsel appearing for the appellant is that there is an express prohibition under section 100 of Act, 53 of 1961 and the prohibition is unambiguous and no order passed by an arbitrator, Registrar, or an officer authorised or empowered by him or by the Government or any officer subordinate to Government shall be liable to be called in question in any Court and that by instituting the suit the plaintiff really called the order of the officer in question. Though the relief of injunction is usually granted by the Court, he pointed out, that it is not the form in which the relief is claimed that matters, but the substance of the relief claimed that should be looked into. In *Firm and Illuri Subbayya Chetty & Sons* v. *The State of Andhra Pradesh*[1], the Supreme Court had to consider section 18-A of the Madras General Sales Tax Act, 1939. A suit was filed by the appellant in that case against the State of Andhra Pradesh for a decree for a certain sum of money on the ground that the amount was illegally recovered from him under the Madras Sales Tax Act. The respondent in the appeal resisted the claim on the ground that the suit was incompetent under section 18-A of the Act. The Supreme Court held that section 18-A excludes the jurisdiction of Civil Court to set aside or modify any assessment made under the Act and there is no express provision in the Act under which the suit can be said to have been filed and it falls under the prohibition in that section. It further pointed out that where an order of assessment has been made by any appropriate authority under the provisions of the Act or any challenge to its correctness and any attempt either to have it set aside or modified must be made before the appellate or revicional forum prescribed by the relevant provisions of the Act. Finally their Lordships held that the suit instituted for that purpose is barred under section 18-A. But their Lordships in dealing with the observations of Lord Thankerton in *Secretary of State* v. *Mask & Company*[2], made the following observations:

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1. L.R. 67 I.A. 222: I.L.R. (1940) Mad. 599: (1940) 2 M.L.J. 140 (P.C.) 52 L.W. 1; A.I.R. 1940 P.C. 105.

1. (1964) 1 S.C.R. 752: (1963) 50 I.T.R. 93: (1963) 2 S.C.J. 725: (1964) 1 M.L.J. (S.C.) 5: (1964) 1 An. W.R. (S.C.) 5: A.I.R. 1965 S.C. 322.

2. I.L.R. (1940) Mad. 599: (1940) 2 M.L.J. 140: 52 L.W. 1: A.I.R. 1940 P.C. 105.

"It is necessary to add that these observations, though made in somewhat wide terms, do not justify the assumption that if a decision has been made by a taxing authority under the provisions of the relevant taking statute, its validity can be challenged by a suit on the ground that it is incorrect on the merits and as such, it can be claimed that the provisions of the said statute have not been complied with. Non-compliance with the provisions of the statute to which reference is made by the Privy Council must, we think, be non-compliance with such fundamental provisions of the statute as would make the entire proceedings before the appropriate authority illegal and without jurisdiction. Similarly, if an appropriate authority has acted in violation of the fundamental pricipies of judicial procedure, that may also tend to make the proceedings illegal and void and this infirmity may affect the validity of the order passed by the authority in question. It is cases of this character where the defect or the infirmity in the order goes to the root of the order and makes it in law invalid and void that these observations may perhaps be invoked in support of the plea that the civil Court can exercise its jurisdiction notwithstanding a provision to the contrary contained in the relevant statute."

The question now is whether in this case the order passed by the authority concerned suffers from infirmity such that the defect goes to the root of the order and makes it in law invalid and void. The Enquiry Officer has passed an *ex parte* order. Both the Courts have found that on 16th August, 1979 the plaintiff was absent and the Enquiry Officer proceeded to record the evidence of of the witnesses on the 5th, 6th, 7th and 14th of September, 1979 in the absence of the plaintiff. The Conrts also found that copies of documents were not granted to the plaintiff. The Courts below pointed out that the plaintiff wrote a letter under Exhibit A-11 asking for certain particulars and also praying to adjourn the enquiry beyond 16th August, 1979, but the Enquiry Officer, D.W. 2' has proceeded *ex parte* on 16th August, 1979. Though this letter, Exhibit A-11, seeking adjournment was sent on 13th August, 1979 as is evident from the postal receipt, it was received and acknowledged by the Enquiry Officer only on 17th August, 1979. Both the delinquent and the Enquiry Officer are residing in Tiruchirapalli itself, and it is rather strange that it should have reached the Enquiry Officer on 17th August, 1979. Both the Courts also say that the plaintiff was not given an opportunity to peruse the depositions recorded during the enquiry under section 60 of the Co-operative Societies Act on the ground that they are "Goverument records and confidential records." On a consideration of these facts, both the Courts concurrently found that the enquiry by the Enquiry Officer is in violation of the principles of natural justice and that the Enquiry Officer has acted without jurisdiction and his report is void. The Courts also found that the order of the second defendant is also vitiated for not following the principles of natural justice and that the 2nd defendant was also wrong in keeping the order of suspension in tact while setting aside the order of dismissal.

8. In this case there is no dispute that the documents of enquiry under section 65 of the Tamil Nadu Co-operative Societies Act were not furnished to the plaintiff. But it is not clear whether during the enquiry under section 65 of the Act the plaintiff himself was examined by the Enquiry Officer. There are no records oroduced in this case to show the terms of reference in respect of the enquiry under S. 65. It cannot, therefore, be said that non-furnishing of copies of enquiry under S. 65 would have prejudiced the plaintiff, but it should be borne in mind that both the courts held that the domestic enquiry officer acted without jurisdiction not merely because he has not furnished the copies of documents of enquiry under S. 65, but for other reasons also such as violation of principles of natural justice, aad not giving an opportunity to the plaintiff and examining the witnesses in his absence and passiog an *ex parte* order even whenhe bas asked for an adjournment. In these cirbumstances, I am constrained to take the view that the defect or the infirmity in the enquiry proceedings goes to the root of the order and makes it in law void and as such the suit by the plaintiff is quite competent and nor barred under S. 100 of the Tamil Nadu Co-operative Secieties Act 53 of 1961.

9. For the foregoing reasons the second appeal fails and is dismissed with costs.

R.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*G. Maheswaran, J.*

P.D. Cruz .. .. *Appellant**

v.

St. Dominics Anglo Indian Girls High School, represented by its Correspondent having office at St. Thomas Mount.

.. *Respondent.*

(*A*) *Tamil Nadu Code of Regulations for Anglo Indian Schools, Article 68-A and Article* 119—*Teacher in an Anglo Indian School dismissed from service—Suit by dismissed teacher for declaration that her dismissal from services was arbitrary, illegal and void — Mandatory injunction for reinstatement prayed for—Maintainability of the suit.*

(*B*) *Specific Relief Act* (47 *of* 1963)—*Suit for declaration by a dismissed teacher—Relief of mandatory injunction for reinstatement asked for—Whether could be granted.*

(*C*) *Master and Servant—Dismissal of teacher—Pure contract of master and servant — Not declared to be a nullity.*

A teacher employed in an Anglo Indian School filed a suit for a declaration that her dismissal from service by the school authorities was arbitrary, illegal and void for want of jurisdiction and for a mandatory injunction directing the management to reinstate her in service. The question that fell for consideration was whether Article 68-A or 119 of the Code of Regulations for Anglo Indian schools would apply.

Held: The provisions of Article 68-A would be attracted in the case where a declaration has to be made that a Headmaster or a teacher is unfit to be a Headmaster or a teacher and the Headmaster or teacher is found to be negligent in the discharge of his duties, or found to have committed any irregularity. The lower appellate Court was right in coming to the conclusion that Article 119 of the Regulation alone applied and not Article 68-A.

[*Para. 6.*]

The relief sought for by the plaintiff including the relief of mandatory injunction to reinstate her into service, indirectly amounts to specific performance of contract of personal service. Such a declaration is not permissible under the law of specific relief. In the case of a servant of the state or local authorities or statutory bodies, courts have declared in appropriate cases the dismissal to be invalid if the dismissal is contrary to the rules of natural justice or if the dismissal is in violation of the provisions of the statute. But dismissal of what is described as pure contract of master and servant is not declared to be a nullity, however wrongful or illegal it may be.

N.A. Padmanabha Rao, for Appellant.

G.M. Nathan, for Respondent.

The Court delivered the following

JUDGMENT:—The plaintiff is the appellant. The suit out of which this second appeal arises was filed by her for a declaration that her dismissal from service by the respondent is arbitrary, illegal and void and for a mandatory injunction directing the respondent to reinstate the plaintiff-appellant into service. The plaintiff was employed in St. Dominics Anglo Indian Girls High School run by the defendant. She was having indifferent health and often had to apply for leave and on this account there was estrangement of feelings between her and the Headmistress of the institution who made some untenable charges against her and appointed one Sr Hyachintha of St. Helens Girls High School as Enquiry Officer. According to the plaint averments, the said enquiry officer conducted the enquiry but no opportunity was given to the plaintiff to cross-examine the witnesses and on the basis of that report the services of the plaintiff were terminated on 27th April, 1978. According to the plaintiff, the disciplinary proceedings were vitiated for want of jurisdiction and is against law and principles of natural justice. It is in these circumstances that she filed the suit for the reliefs stated above.

*S. A. No. 2270 of 1981. *20th September*, 1984.

2. The suit was resisted by the respondent-school on the ground that the order of dismissal is correct as the enquiry was conducted in accordance with the principles of natural. justice. The defendant denied the allegation that no opportunity was given to the plaintiff for cross-examining the witnesses.

3. The trial Judge held that the defendant, respondent has contravented the provisions of II of Article 68-A of the Code of Regulations for Anglo Indian Schools (hereinafter referred to as the Regulations) and decreed the suit as prayed for. On appeal, the learned appellate Judge reversed that finding and stated that the provisions of Article 68-A are not attracted and that Article 119 of the Regulatoins alone will apply and in the end, allowed the appeal and dismissed the suit. The plaintiff has filed this second appeal.

4. While admitting the second appeal, a learned Judge of this Court has formulatted the following substantial question of law:—

1. Whether the lower appellate Court erred in law with reference to interpretation of Art. 68-A of the Code of Regulations for Anglo-Indian Schools? and

2. Whether the lower Appellate Court omitted to take note of the fact that there was lack of opportunity to the appellant to cross-examine the witnesses during the course of enquiry?

5. Dealing with the second question of law first, I must at once point out that the allegation that the appellant was not given an opportunity to cross-examine witnesses during enquriy is not well-founded, for in the proceedings of the Enquiry Officer marked as Exhibit B-3, it is found that the plaintiff was given enough opportunity to cross-examine the witnesses examined by the Enquiry Officer. The Enquiry Officer, it is seen, has directed the plaintiff to cross-examine the witnesses and in fact the plaintiff has cross-examined them also. Opportunity was given to the plaintiff to examine her own witnesses also. To say that no opportunity was given to the plaintiff to examine the witnesses, is not correct. The learned appellate Judge has dealt with this question and it is wrong to say that the appellate Court has not taken note of this question, That disposes of the second point of law.

6. The first point of law requires consideration. It is admitted that the services of the plaintiff are governed by a contract between the plaintiff and the defendant, evidenced by Exhibit B-2. Execution of Exhibit B-2 is also admitted. The trial Court relying on Article 68-A of the Regulations was of the view that there is a violation of the Regulations as neither the Inspector of Anglo-Indian Schools no any Officer deputed for that pnrpose, has enquired into the charges framed against the plaintiff. Article 68-A of the Regulation runs thus:

"If the Headmaster or any other teacher of a school is found to be negligent in the discharge of his duties or is fonnd to have committed any irregularity, the Director shall, after due enquiry declare him unfit to be a Headmaster or a teacher for a specified period or permanently as circumstances of the case warrant.

Such declaration shall not be made until the teacher or Headmaster has beeu informed in writing of the charges against him and full enquiry has been made either by the Inspector of Anglo-Indian Schools or any other officer deputed by the Director for the purpose, provided that this procedure need not be followed in cases where the teacher or Headmaster has been convicted by a competent Court".

A careful reading of Article 68-A would show that it would be attracted in the case of any Headmaster or any teacher being found negligent in the discharge of his duties or found to have committed any irregularity. In such cases, the Direstor shall after due enquiry, declare the Headmaster or the teacher unfit to be a Headmaster or teacher for a specified period or permanently as the circumstances of the case warrant. It is only when such a declaration is to be made that Article 68-A is to be resorted to. But this case appears to be one covered by Article 119 of the Regulations which runs thus:

"In recognised schools every paid teacher shall be engaged under a written agreement

with the management terminable on either side with three months' notice or three months' salary in lieu of. The agreement shall be in the form prescribed in Appendix 48." (Proviso omitted)

Now, a reading of clause 7 (ii) of Appendix 48 would show that the school authorities shall have the power in termiaate the services of a teacher when he a becomes a permanent member of the staff (*a*) without notice for any or for all of the following reasons:

Wilful neglect of duty; serious miscoudnct; gross insubordination; mental unfitness; suspension or cancellation of teacher's certificate by the Director of Public Instruction under Code of Regulations for Anglo-Indian Schools, and

(*b*) With three months' notice or three months' salary in lieu thereof for the following reasons:

"Incompetence, retrenchment, physical unfitness or any other good cause. (Provise omitted)

A reading of both Articles 119 and 68-A together would show that the provisions of Article 68-A would be attracted only in the case where a declaration has to be made that a Headmaster or a teacher is unfit to be a Headmaster or a teacher and the Headmaster or teacher is found to be negligent in in the discharge of duties, or found to have committed any irregularity. In this case, a reading ot Ex. B-2 will show that the wording in Clause 7 of Appendix 48 has been extracted and the plaintiff has signed in Exhibit B-2. Therefore, the lower appellate Court was right in coming to the conclusion that Article 119 of the Regulations alone applied and not Article 68-A.

7. It is contended by the learaed counsel for the respondent that a suit for declaration would not lie. This is a case where the services of the plaintiff under the management of the defendant-school is governed by the contract, Exhibit B-2. In such circumstances, only a suit for damages would lie. In my opinion, the relief as sought for by the plaintiff including the relief of mandatory injunction to reinstate her into service indirectly amounts to specific performance of contract for personal service. Such a declaration is not permissible under the law of specific reliefs. But in the case of a servant of the State or local authorities or statutary bodies, Courts have declared in appropriate cases the dismissal to be invalid if the disnsisal is contrary to rules of natural justice or if the dismissal is in violation of the provisions of the statute. But dismissal of what is described as pure contract of master and servant is not declared to be a nullity. however, wrongful or illegal it may be. For the foregoing reasons, this second appeal is dismissed but in the circumstances without costs.

R.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—*S. Mohan and T. Sathiadev, JJ.*

State of Tamil Nadu and another .. *Appellants**

v.

M/s. The Saroja Mills Ltd., Coimbatore .. *Respondent.*

Land Acquisition Act (I of 1894), sections 4 (1), 6 and Part VII—Land acquired under Part VII and placed at respondent's disposal—A portion alone claimed to have been utilised for the purpose of the acquisition—G.O. directing resumption of remaining portion—Rospondent willing—Land claimed to be utilised not properly utilised Another G O. issued for resumption of entire land— Volidity of G.O. challenged by filing writ— —Pending writ., new proposal to respondent by Government to assign on certain terms—Effect — Valldity of impugned G.O. upheld in appeal—Subsequent proposal cannot whittle down power of resumption.

Lands measuring 39.93 acres were acquired under Part VII of the Land Acquisition Act and placed at the disposal of the respondent Mills for constructing houses for the labourers of the Milis. Only about 5.76 acres had been utilised by the respondent for this purpose.

*W.P. No. 453 of 1980. *29th February, 1984*

By G.O. Ms. No. 4293 dated 25th October, 1966 the Government directed resumption of the remaining extent. It was found later on that there was no proper utilisation at all. Government passed an order G.O. Ms. No. 382. Housing dated 13th May, 1977, directing the entire 39.93 acres of land to be resumed immediately because the respondent had not utilised the entire land for the purpose for which it had been acquired, paying as compensation to the respondent an amount inclusive of solatium based on the cost of the premises fixed at the time of acquisition. An area of 5.95 acres was also directed to be handed over to the Central Warehousing Corporation and the rest to the Tamil Nadu Housing Board. The G.O. was questioned by the respondent in W.P. No. 3442 of 1977. Pending the writ petition, by its letter dated 16th January, 1980, Government asked the respondent if it was agreeable to the assignment of 39.93 acres on payment of market value on condition the respondent wonld withdraw the writ petition and also submit a scheme within 3 months for construction of houses for the Mill-workers. A single Judge held that in view of the later proposal the impugned G O. had became ineffective, that the 5.78 acres utilised by the respondent already could not be resumed and that the amount of compensation should be revised by including certain sums.

On appeal against the order,

Held:—The acquisition was in exercise of the power of eminent domain under Part VII, Land Acquisition Act. An agreement in terms of this Part has to be eniered into since it is only on that agreement that the lands are placed at the disposal of the respondent. One of the terms of the agreement is that the entire extent of the land must be utilised for the purpose of acquisition. If there is a failure or a breach of the condition by the respondent, it is no use to say that a portion of the land had been utilised for the purpose, if in fact there was no proper utilisation thereof. The earlier G.O. proceeded on the assumption of proper utilisation. When it transpired that it was not so resumption of the entire land was directed by the later G.O. there being no ulternative. The impugned Government Order is perfectly valid. The power of resumption is a logical corollery of the power of eminent domain and cannot in any way be diluted or whittled down by the subsequent proposal of the Government. [*Para.* 4.]

C. Chinnaswami, Special Government Pleader, for Appellants.

R. Arunagirinathan, for Raj and Raj, for Respondent.

The Judgment of the Court was delivered by

Mohan, J.—The short facts leading to the writ appeal are as follows: An extent of 39.93 acres in S. No. 70/1C, 71/1C and 72/1 etc., in Singanallur was acquired under Part VII of the Land Acquisition Act (for short the Act) and was placed at the disposal of the respondent mills. The public purpose as noted in the section 4 (1) notification and declaration under section 6 was, for putting up residential quarters for the labourers of the mills under the Subsidised Industrial Housing Scheme. The respondent mill claimed that it had utilised an extent of 5.78 acres by putting up a few houses. This is disputed on behalf of the State. However, since not very much turns upon the same, we need not dwell at length on that. In so far as the other extent was not utilised the Government made proposal in G.O. Ms. No. 4293 dated 25th October, 1966 for the resumption of the remaining extent. That G.O. may be extracted:

> 'In the circumstances reported, the Government accept the proposal of the Commissioner of Labour, Madras, that the unutilised lands measuring an extent of 34.15 acres acquired on behalf of M/s. Saroja Mills Ltd,, Singanallur under the Land Acquisition Act be resumed. The Commissioner of Labour is requested to take necessary action in consultation with the Collector of Coimbatore in the matter.
>
> The Commissioner of Labour, Madras is also requested to send a report to the Government through the Chairman, State Housing Board whether the lands after resumption can be utilised for construction of houses under Subsidised Industrial Housing Scheme (Govt. Sector) in due course'.

Thereafter, the Commissioner of Labour acting on the G.O. called upon the respondent mill to hand over the land measuring an extent of 34.15 acres directed to be resumed. To that the respondent mill wrote a reply on 20th September, 1969, agreeing to hand over the remaining untilised portion of the said extent of 34.15 acres. It was, at this stage, the Government passed the impugned G.O. Ms. No. 382 Housing dt. 13th May, 1977, which is as follows:

'In the Goveroment order first read above, the Government ordered that the unutillised extent of land in Singanallur village (Coimbatore taluk and district measuring 34.15 acres (out of 39.93) acres in S. No. 70/1 etc. acquired on behalf of Saroja Mills, Singanallur be handed over to the Tamil Nadu Housing Board for its various housing schemes.

The Collector of Coimbatore in his letter third read above has reported that an extent of 39.93 acres in S. No. 70/1 etc. of Singanallur village was acquired as per award No. 11/55 dt. 18th May, 1975, and so there is a difference of 0.10 cents in the total extent indicated in the Government order first read above.

The Regional Director Central Ware-Housing Corporation, Madras has requested for allotment of land in the area for construction of godown in Coimbatore taluk.

Thiruvalargal Saroja Mills, Singanallur, Coimbatore has not utilised the land for the purpose for which the land was acquired. In the circumstances, the Government direct that the extent of 39.93 acres in S. No. 70/1 etc. of Singanallur village Coimbatore Taluk and district be resumed immediately on payment to the Saroja Mills of Rs. 52,752.37 inclusive of 15 per cent solatium based on the cost of the premises fixed at the time of acquisition.

The Collector of Coimbatore is requested to arrange to hand over immediately after resumption of the lands an extent of 5.95 acres lying to the west of Tiruchi-Peelamedu Erode road to the Central Ware Housing Corporation, Madras on payment of by the institution of proportionate share of Rs. 52,752.37. The Government also direct that the balance of 33.98 acres be handed-over to the Tamil Nadu Housing Board on payment of proportionate share of Rs. 5,752,37. The Collector of Coimbatore is requested to take immediate action in the matter as the Central Ware-Housing Corporation is in need of the land very urgently'.

This G O. was questioned in W.P. No. 3442 of 1977 which came up for adjudication before our learned brother Justice Padmanabhan. Pending the writ petition, the Government made a proposal by its letter dated 18th January, 1980, calling upon the respondent to state whether it was agreeable to the assignment of 33.93 acres under BSO: 21 on payment of the market value of the lands and whether the respondent would agree to withdraw the said writ petition. The further condition was within three months it should submit a scheme for construction of houses to the mills workers under the Subsidised Industrial Housing Scheme (Private Sector) and for grant of loan and subsidy for the scheme, through the Commissioner of Labour to Government. On the strength of this letter, it was argued before the learned Judge that in view of this proposal the impugned G.O. had become ineffective and the further argument was that because the respondent mill had utilised an extent of 5.78 acres by putting up building in any event, that extent cannot be resumed. Though opposed on behalf of the State, the learned Judge accepted the contentions and gave clarification with regard to the proposed extent of resumption holding that only 34.15 acres alone can be resumed. The further clarification that was given was with regard to the amount to be paid to the respondent which did not take into account the excess compensation and the solatium that was paid by the respondent as per the judgment of the High Court which amounted to Rs. 38,373.41. Therefore, it was held that this amount will be due to the respondent. In these terms, the writ petition was ordered. We are obliged to conclude in view of the clarification that the learned Judge had practically held the impugned G.O. to be inoperative. Thus, the writ appeal by the State.

2. It is urged on behalf of the State by the learned Government Pleader, Mr. C. Chinnaswami, that it is impossible to hold that by reason of a subsequent proposal to assign

the remaining unutilised extent under B.S.O. 21, the Government's power of resumption of lands is in any way rendered invalid. One of the conditions entered into between the State and the respondent Mills at the time of acquisition was that the entire extent of 39. 95 acres shall be utilised for the purpose of acquisition. Merely because, the respondent had utilised an extent of 5. 78 acres, it would not follow there is no breach of the condition entered into between the parties. If, therefore, there was a breach there is nothing wrong in the Government acquiring the entire extent of 39. 95 acres. It is not open to the respondent mills to say that it had utilised one portion thereof and that must be excluded from the purview of resumption. As regards the subsequent correspondence, even assuming there was a mistake with regard to the extent, that is not a matter to be corrected in writ jurisdiction. The Court ought to have directed the parties to work out their rights by negotiations and should not have interfered with under Article 226 of the Constitution. The same argument will apply even as regards the amount to be paid to the respondent.

3. Mr. R. Arunagirinathan, learned counsel for the respondent mills would submit that in this case; the respondent mills admittedly utilised an extent of 5. 78 acres by putting up buildings. Therefore, if at all resumption is made it can be only of the remaining extent and not the entire extent. No doubt, a condition was stipulated at the time of placing the lands at the disposal of the respondent mills for which the necessary agreement was entered into under sectlon 40 of the Act that the entire land should be utilised. But, where it is not possible and where it was further proposed that the remaining extent will be assigned, the position of the parties will stand altered as per the subsequent proposal and cannot be relegated to the date of the agreement entererd into under section 40 of the Act. Equally, the impugned G.O., says that a sum of Rs. 52,752. 37 inclusive of 15 per cent solatium should be paid by the respondent mills as a pre-condition to the assignment. That does not take note of the earlier payment by the mills. Therefore, rightly the learned Judge deducted that liability.

4. We have given our very careful consideration to the above argument. It cannot be gainsaid that this acquisition by the exercise of the power of eminent domain was under Part VII of the Act. The extent that formed thesubject-matter of acquisition was 39.93 acres. It has already been noted the public purpose as manifested by section 4 (1) notification and the declaration under section 6 is as follows: 'Putting up residential quarters for labourers of the mills under the Subsidised Industrial Housing Scheme.' Inasmuch as the acquisition was under part 7 of the Act, undoubtedly an agreement in terms of that part will have to be entered into, because it is on that agreement the lands are placed at the disposal of the respondent. One of the terms of the agreement was, which was common cause between the parties, that the entire extent of 39.93 acres must be utilised for the purpose of acquisition. If therefore there is a failure or a breach of the condition, it is not open to the respondent mills to say that they have utilised a portion of the extent 5.78 acres and put up houses for labourers and therefore that should be exempt from resumption. As to what type of building that were pnt up in the 5.78 acres is borne out by the report of the Collector made in Ref. No. 149469/75 F2 dt. 10th March Seventy-seven in paragraph 6 which is extracted below :

> 'In the reference third cited, the Revenue Divisional Officer, Coimbatore has submitted resumption proposals for the entire extent of 39,93 acres of land comprising of land comprising of S. No. 70/1-A etc. of Singanallur village, Coimbatore Taluk, The Revenue Divisional Officer, Coimbatore in his first report has stated that in S. No. 72/2, there are 5 houses in unfinished stage and that these buildings appear in the same stage for the past several years. The bricks from the above buildings are being removed by the miscreants and it seems that no attempt has been made by the owner of the land to protect the building or complete land make them fit for use. Thus the buildings can be said to have been abandoned. Further, he has stated that this bit of land in S. No. 72/2 (3.05 acres) is surrounded by the lands covered under resumption, and that the portion of the land with its incomplete buildings will be an eyesore and hindrance to the Housing Board for its housing schemes. There is a tiled building in S. No. 70/1C and it is

said that it was in existence even at the time of acquisition. There is a well in S. No.70/1A- It is being used for drinking purposes'.

Therefore, in fact, there is no proper utilisation, at all. It was only on the assumption that the respondent had utilised 5.78 acres G. O.Ms. No. 4293 (Housing) dated 25th October, 1966 were passed stating that the unutilised land measuring an extent of 34.15 acres acquired on behalf of the mills be resumed. It was only on that basis the Commissioner also wrote on 6th September, 1969 to the respondent mills calling upon them to place the land at the disposal of the Chairman of the State Housing Board to which the respondent mills also agreed to by its letter dated 20th September, 1969. As a matter of fact, the rerpondent mills itself in paragraph 4 of the affidavit states thus: 'Inspite of the above agreement, neither the respondents nor the State Housing Board took any steps to implement the terms of the agreement'. However, when the Government came to know because of the improvised structure put by the respondent mills, there was no utilisation at all, they are well entitled to resume the entire extent of 39.93 acres under the impugned G.0. Ms. No. 382, Housing dt. 13th May, 1977. Therefore, we are unable to agree with the respondent's contention that because of the subsequent proposal to assign the remaining extent of 34.15 acres the power of resumption is in any way whittled down. That is a power which is a corrolary to the power of eminet domain. That cannot in any way be diluted or diminished by reason of the subsequent proposal. This much we have to make clear because of the Judgment under appeal though in terms did not say the G.O. is ineffective, practically it aecepted the respondent mills' contention. Therefore, we have no hesitation in upholding the G.O. Ms. No. 382, Housing dated 13th May, 1977.

5. What is the legal consequence of the subsequent events? No doubt, the Government stated in their letter dated 18th January, 1980, that they were willing to assign the lands on the payment of market value under B.S.O. 21. But that was hedged in by conditions: (1) the respondent should withdraw the W.P. No. 3442 of 1977 immediately. (2) Should submit within three months a scheme for construction of houses to the mill's workers under the Subsidised Industrial Housing Scheme (Private Sector) and for grant of loan and subsidy for the scheme through the Commissioner of Labour to Government. We are unable to hold from the records available that these proposals have attained fruition. The parties before us are at variance whether this proposal still exists and could be completed or not. Therefore, we leave that question open. Once that is left open, the clarifications given by the learned Judge both with regard to the extent and also with regard to the quantum will have to be set aside. Accordingly they are set aside. In the result, we hold (*i*) that the impugned order made in G.O. Ms. No. 382, Housing dated 13th May, 1977, directing resumption of the entire extent is valid; (*ii*) that by reason of the subsequent correspondence between the parties, we are not in a position to hold from the records made available before us that the proposal regarding assignment had attained fruition; (*iii*) the respondent is at liaberty to negotiate for assignment and if the Government are willing this Judgment will not stand in the way of such an assignment, on such terms as the Government may deem it fit to impose. The writ appeal is allowed with costs. Counsel's fee Rs. 500/-

R.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ramaswami, J.*

Messrs. Amin and Company, represented by partner, S.A. Aboobucker

.. *Appellant**

v.

Messrs. Southern Roadways Limiled, Madurai .. *Respondent.*

Cerriers Act (III of 1865), sections 8 and 9—Liability of carrier for loss or damage—Onus of proof that the carrier was not negligent or guilty of any criminal actlies on the carrier himself—Production of way-bill—Effect.

As to the liability of a carrier for loss caused by delivering goods to a person producing the way—bill and the duty cast on the carrier,

* Appeal No. 356 of 1979. *25th January,* 1984.

Held:—Section 8 of the Carriers Act shows that the liability of the carrier arises for loss or damage "by the criminal act of the the carrier or of any of his agents or servants" and also where such loss or damage has arisen from the negligence of the carrier or any of his agents or servants. Therefore, unless the carrier or any of his agent or servant is guilty of negligence or guilty of a criminal act or fraud, he would not be liable for making good the loss or damage. Courts have also recognised the common law exceptions to the liability of a carrier, namely act of God and enemies of the State. Section 9 deals with the onus and that squarely rests the onus of proving that the carrier was not negligent or not guilty of any criminal act, on the carrier himself. To that extent it is enough for the plaintiffs, if they prove that they entrusted the goods to the carrier and that there was lossor damage and it has not been delivered, in order to entitle them to claim the value of the goods or damage. The onus will thereafter shift to the carrier, if he wants to extricate himself from liability, to prove that he was not negligent or not guilty of any criminal act. [*Para.* 3.

Though the carrier should be satisfied about the identity of the person producing the way-bill the question will have to be approached, not in the abstract but with reference to the facts and circumstances in each case. If there were grounds to suspect the identity of the person a need for verification arises. Where the dealers were a firm known to the carriers, sending old people, known and unknown including cartmen to take delivery of the goods and the goods were being delivered to them with no occasion earlier to claim loss in this regard, the carriers could not be said to have acted negligently or without due care or caution in presuming that the person who came with the original way-bill was an authorised person to receive the goods. [*Para.* 4.]

Case referred to:—

Easwara Iyer and Sons v. *M.B. Transport Company*, (1964) 2 M.L.J. 181: I.L.R. (1964) 1 Mad. 997: 77 L.W. 221: A.I.R. 1964 Mad. 516.

A.J. Abdul Razack, for Appellant.

A.R. Ramanathan, for Respondent.

The Court delivered the following

JUDGMENT:—The plaintiffss are the appellants. They are dealers in handloom goods. They have a branch an Kadayanallur. On 24th January, 1975 the plaintiffs, branch at Kadayanallur despatched two bundles of handloom lungies valued at Rs. 10,895-65 P. to the plaintiffs at Madras under their way-bill, the original of which has been marked as Exhibit B-1 in the case, through the defendents who are common carriers within the meaning of that term under the Carriers Act (III of 1865). The plaintiff's branch sent the original way-bill to the plaintiffs by post on the same day of despatch of the goods. On the next day, namely, the 25th January, 1975, the branch office sent another letter to the plaintiffs with reference to other matters connected with the business, in which also they made a reference to the despatch of the two bales on the 24th. That letter was received by the plaintiffs on the 27th. On the ground that they have not received the original way bill sent on the 24th, the plaintiffs wrote to the Kadayanallur branch informing them to get a consent letter from the consignor and the carrier and send it to them so as to enable them to clear the parcel. As to when this letter was written by the plaintiff, there is no evidence. However, we find that on 3rd February, 1975, the plaintiffs received from the branch a consent letter of the consignor duly endorsed by the defendants' agent at Kadayanallur. Armed with this letter, they approached the defendants on the 3rd February to take delivery of the consignment. The plaintiffs' clerk, who went to the office of the defendants was informed that the parcel was taken delivery of on 27th January, 1975 by producing the original way-bill (Exhibit B-1) with an endorsement there on purported to have been signed by the plaintiffs with a direction to deliver the parcel to the office-boy and it was taken delivery of by a person named Babu claiming himself to be the person authorised to take delivery. Thereafter, disputing the rubber-stamp and the authorisation given on behalf of the plaintiffs endorsed on the way-bill, and also denying that the person who had taken delivery of the parcel is the office-boy or the agent of the plaintiffs, the present suit was filed claiming recovery of the sum of Rs. 10, 895-65 p. being the value of the goods.

2. The defendants pleaded that the original way-bill was produced for delivery of the

goods, that it contained the rubber-stamp of the plaintiffs and was duly endorsed with a request to deliver the bundle to the office-boy. The person who produced the way-bill claimed to be the person authorised under the endorsement. There was no reason for the defendants either to dispute the endorsement or the person who brought the way-bill for taking delivery of the goods and therefore, they delivered the goods when the original way-bill itself was produced. They further claimed that they were not guilty of any negligence or want of exercise of due care and caution and they also contended that they were not guilty of any fraud or collusion with any party in delivering the goods.

3. The parties proceeded on the basis that the goods were not delivered to the plaintiffs and therefore, it has to be presumed that the endorsement in the way-bill was not that of the plaintiffs and that the person who took delivery was not authorised by the plaintiffs to take delivery of the goods. The question for consideration, therefore, is whether the defendants are liable to make good the loss to the plaintiffs or on any ground they can extricate themselves from the liability to make good the loss. As already stated, the defendants are common carriers whose rights and liabilities are governed by the provisions of the Carriers Act (III of 1865). The goods despatched are also not special goods referred to in section 3 of the Act. The carriers are therefore governed by the provisions of sections 8 and 9 of the Act. Section 8 provides as follows :

> "Notwithstanding anything herein-before contained, every common carrier shall be liable to the owner for loss of or damage to any property delivered to such carrier to be carried where such loss or damage shall have arisen from the criminal act of the carrier or any of his agents or servants and shall also be liable to the owner for loss or damage to any such property other than property to which the provisions of section 3 apply and in respect of which the declaration required by that section has not been made, where such loss or damage has arisen from the negligence of the carrier or any of his agents or servants."

It may be seen from the provisions of section 8 that the liability of the carrier arises for loss or damage "by the criminal act of the carrier or any of his agents or servants" and also where such loss or damage" has arisen from the negligence of the carrier or any of his agents or servants." Therefore, unless the carrier or his agent or servant is guilty of negligence or guilty of a criminal act or fraud, he would not be liable for making good the loss or damage. Of course, Courts have recognised the common law exceptions to the liability of a carrier, namely act of God and enemies of the State. Section 9 deals with the onus and that squarely rests the onus of proving that the carrier was not negligent or not guilty of any criminal act, on the carrier himself. To that extent it is enough for the plaintiffs, if they prove that they entrusted the goods to the carrier and that there was a loss or damage and it was not delivered, in order to entitle them to claim the value of the goods or damage. The onus will thereafter shift to the carrier, if he wants to extricate himself from liability, to prove that he was not negligent or not guilty of any criminal act.

4. We have already seen that the person who took delivery of the goods produced the original way-bill. Normally, it is not expected that the original way-bill will find a way to a person who is not consignee. In this case, it was the case of the plaintiffs that their branch office despatched by post the original way-bill to the plaintiffs at Madras. They used a printed addressed cover of the plaintiff for posting such letters. That printed addressed cover, a specimen of which is marked as Exhibit A-2, also contains the P.B. number of the plaintiff. It is thererefore presumed that the letter would have reached Madras and was put in the post-box or post-bag allotted to the plaintiffs. We have to assume so, even for the reason that the plaintiffs themselves stated that their agent posted that way-bill at Kadayanallur and it had reched Madras as seen from the production of the way-bill before the defendant. It is also not the case of the plaintiffs that the Postal department had also colluded with the person who took delivery of the goods a handed over the original way-bill to that person and did not place it in the P.B. number alloted to the plaintiffs. Therefore after it had reached Madras, and been deposited in the P.B. Number referable to the plaintiffs, the way-bill should have gone to the hands of the man who got delivery of the goods. It is admitted by the

plaintiffs that only the plaintiffs' authorised agent would go and open the post-box or post-bag and take delivery of the letters addressed to the plaintiffs. Therefore, something should have happened after it was taken delivery by the authorised agent of the plaintiffs, as we now find the original way-bill was produced by someone who was not the authorised agent of the plaintiffs. Without the connivance of the authorised agent who opened the post-box or bag allotted to the plaintiffs, the way-bill could not have gone into the hands of a third-party. That is one aspect of the matter which I am referring to show that there should have been some sort of a contributory negligence on the part of the plaintiffs enabling a fraud being committed by a third-party. It is also in evidence that the plaintiffs used to send cartmen and some others who are not their regular employee, to take delivery of the goods giving them due authorisations and, in the course of two years prior to the loss in question, there were about 1500 parcels that were cleared by the plaintiffs by such authorisations. The original way-bill produced contained a rubber-stamp similar to that used by the plaintiffs, which I have verified and it does not show any suspicious circumstance to doubt its genuineness. Having regard to the large number of parcels that the plaintiffs have been receiving and different persons including cartmen clearing the same, the defendant does not seem to have entertained any doubt about the genuinensss of the endorcement or the impersonation of the person who wanted to take delivery of the goods. Learned counsel for the appellants seriously contended that when the person claiming himself as Babu and the office-boy of the plaintiffs, wanted to take delivery of the goods, there was a heavy duty on the defendants to have verified the identity of the person and since they have failed in that duty, the liability shall have to be fastened on the defendants. In this connection, he also referred to a decision of a Single Judge of this Court in *Easwara Iyer and Sons* v. *M.B. Transport Company*, (1964) 2 M.L.J. 181: I.L.R. (1964) 1 Mad. 997: 77 L.W. 221: A.I.R. 1964 Mad. 516 wherein the learned Judge has observed:

"It is the elementary duty of a carrier to enquire, whenever a person presents the consignee's note, whether he is the prope. person or the consignee's authorised agentr He should have taken steps to call upon him to identify if he is the proper person or he should have taken some measures or some device to prevent misdelivery, wrong delivery."

It is true that the carrier should be satisfied about the identity of the person who produces the way-bill. But, this question will have to be approached, not in the abstract, but with reference to the facts and circumstances in each case. If there were grounds for suspecting the identity of the person, a need for verification arises. As already stated, the plaintiffs are a known firm to the defendants; they have been sending odd persons, known and unknown, including cartmen, to take delivery of the goods; they have been delivering the goods to such person and there was no occasion earlier to claim any loss in this regard. In the circumstances, therefore, by their presuming that the person who came with the original way bill was an authorised person, the defendants could not be said to have acted negligently or without due care or caution. In fact, we do not have any system of carrying identity cards and fraudulent people are always very clever and would pose themselves as the correct persons authorised. Therefore, unless there are other extraordinary circumstances which should have put the defendants on caution requiring them to take more precautions then that was normally expected, we could not say that they have acted negligently. Further, I have verified the original order in Civil Revision Petition No 937 of 1961, in the case reported in *Easwara Iyer and Sons* v. *M.B. Transport Company*, (1964) 2 M.L.J. 181: 77 L.W. 221 : A.I.R. 1964 Madras, 516. I find that the defendant carrier in that case did not produce the original way-bill against which he claimed he delivered the goods to a person not authorised by the plaintiff therein. Only the delivery note signed by that third-party acknowleding having. taken delivery of the parcel was produced. This makes all the difference in considering the question whether the carrier has discharged his onus of proving that he

was not negligent. The fact that the original way-bill was produced for delivery of the goods, which is present in this case, makes all the difference or at least an important factor in considering the question of negligence. Though the plaintiffs alleged an original act or a conspiracy or a type of collusion between the employees of the defendants and the person who took delivery of the goods, that fact is denied in the evidence of D.W.1. and no other circumstance has been made out even to create a suspicion of that nature. The defendants are a reputed company in Southern India and the plaintiffs themselves had no other occasion to complain of any collusion at any time before. In the circumstances, I have to conclude that the defendants are neither negligent nor guilty of any criminal act.

5. In the result, the Judgment and Decree of the Court below are confirmed and this appeal is dismissed. But there, will be no orders as to costs.

R.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—P. *Venugopal. J,*

His Holiness Sriman Sadagopa Sri Vedantha Desika Yathindra Mahadesikan, 44th Jeer or Sri Ahobila Math, Hereditary Trustee of Vedantha Desikar Sannadhi within the precincts of Sri Ranganathaswami Temple, rep. by Attorney agent, Srinivasachariar. .. *Appellant**

v.

The Commr, H.R. & C.E., (Admn.) Dept., Madras and others .. *Respondents.*

(A) *Civil Procedure Code (V of 1908), section 80—Notice—Suit to set aside order passed by the Commissioner, H.R. & C.E.—Notice under section 80, Civil Procedure Code not given—Suit, if maintainable.*

(B) *Hindu Religious and Charitable Endowments Act (XXII of 1959), sections 110 and 70.*

On the question whethernotice under section 80, Civil Procedure Code, is necessary before filing suit for cancelling an order of the Commissioner, H.R. & C.E. Department confirming an order giving a finding as to the established usage,

Held: Section 110 of Act 22 of 1959 provides that where a Commissioner or a Deputy Commissioner making an enquiry or hearing an appeal under Chapter V or Chapter VI of the Act the enquiry shall be made and the appeal shall be heard in accordance with the procedure applicable under the Code of Civil Procedure to trials or the hearing of appeals. The provisions of Indian Evidence Act and Indian Oaths Act are also applicable to such enquiries or appeals. The order passed by the Deputy Commissioner under section 63 of the Act is a quasi-judicial order passed by him in exercise of his quasi-judicial functions. The appellate order passed by the Commissioner is also a a quasi-judicial order passed by him in exercise of his quasi-judicial functions. In respect of enforcing the statutory remedy under section 70 of the Act, the Deputy Commissioner or the Commissioner have passed quasi-judicial orders in exercise of their quasi-judicial functions and in that view, they cannot be termed to be public officers purporting to act in their official capacity within the meaning of section 80, Civil Procedure Code. It, therefore, follows that for enforcing the statutory right conferred under section 70 of the Act, notice under 80, Civil Procedure Code, is unnecessary. Even without notice, the suit is maintainable. [*Para.* 8.]

Cases referred to:—

Lakshmana Shah v. *Commissioner, H.R. & C.E.*,(1971) 2 M.L.J. 495: 84 L.W. 828: A.I.R. 1972 Mad. 319; *Santhanagopala Chettiar* v. *Seetharama Chettiar*, (1974) 1 M.L.J. 215; *Commissioner, H.R. & C.E.* v. *E.V. Kacherichamy*, (1981) 2 M.L.J. 375; *S.D.G. Pandarasannidhi* v. *State of Madras*, (1965) 2 M.L.J. (S.C.) 167: (1965) 2 An.W.R. (S.C.) 167; (1965) 2 S.C.J. 711: (1965) 3 S.C.R. 17: A.I.R. 1965 S.C. 1578; *Province of Madras* v. *Vikrama Rao*, (1943) 1 M.L.J. 53: 56 L.W. 50: 1943 M.W.N. 56: A.I.R 1943 Mad. 284; *Ebrahimbhai* v. *State*, A.I.R. 1975 Bom. 13; *Santhanagopala Chettiar* v. *Seetharama Chettiar* (1968) 2 M.L J. 41.

P Seshadri, for Appellant.

V. Nicholas, Government Advocate, for Respondents No. 1.

* A.S. No. 942 of 1978. *3rd August*, 1984.

P.S. Srisailam, for Respondents Nos. 7 to 15.
S.A. Rajan, for Respondent No. 2.

The Court delivered the following

JUDGMENT.—Plaintiff is the appellant. Defendants 1 to 6, 8 to 10, 12 to 17. 19, 22 and 24 to 26 are the respondents. 21st respondent has been impleaded in the appeal.

2. According to the plaintiff there is an established usage to bring Sri Vedantha Desikar to Adhyayana Mandapam of Lord Ranganatha on the days of Yugathi, Deepavali, Kanu, etc and on Tirunakshathram day into the sanctum sanctorum of Lord Ranganatha with Vadakalai mark and with all paraphernalia like Vadakalai Namam, Pathram, Vazhithirunamam, etc. In order that the established usage is followed in the temple, the plaintiff made an application to the trustees of Sri Ranganatha Swami Devasthanam to take Sri Vedantha Desikar idol to worship Lord Ranganatha on the occasions mentioned above with the Vadakalai mark on his fore-head. The trustees imposed a condition that the idol should bear only the Thenkalai mark on His fore-head. Thereafter, the plaintiff filed an application before the Deputy Commissioner, H.R. & C.E., Department, to permit and follow the established usage while taking the idol of Sri Vedantha Desigar with all Vadakalai paraphernalia for Mangalasasanam on the Thirunakshatram day into the sanctum sanctorum of Lord Ranganathar. The Deputy Commissioner passed an order that the established usage was to take Sri Vedantha Desikar to the sanctum sanctorum of Lord Ranganathar only with the Thenkalai mark. The appeal to the Commissioner, H.R. & C.E. Department, having proved futile, the plaintiff filed the suit under section 70 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, Act 22 of 1959 (hereinafter referred to as the Act) for cancelling the order of the Commissioner.

3. On a preliminary objection that the suit is not maintainable without a notice under section 80, Civil Procedure Code, the trial court held that the suit is to set aside the order made by a public officer, namely, the Commissioner, H.R. & C.E., Department, in respect of an act done in discharge of his official duty and such a suit without the issue of notice under section 80, Civil procedure Code, is not maintainable and on this finding, the suit was dismissed with costs of defendants 1 and 2. Against this decree and judgment of the trial Court, the plaintiff has preferred the present appeal.

4. Learned counsel for the 2nd defendant contended that a notice under section 80, Civil Procedure Code, is necessary before a suit can be filed against the 2nd defendant. Learned counsel for the plaintiff pointed out that the 2nd defendant has been impleaded as representing Sri Ranganathaswamy Devasthanam and not in his individual capacity. Now that the Executive Officer has been impleaded as representing the Devasthanam, no notice is necessary.

5. Relying on the Bench decision of this Court in *Lakshmana Shah* v. *Cammissioner, H.R. & C.E.*, (1971) 2 M.L J. 495: 84 L.W. 828: A.I.R. 1972 Mad. 319 and *Santhanagopala Chettiar* v. *Seetharama Chettiar*, (1974) 1 M.L.J. 215 and also a decision of a decision of a Single Judge in *Commissioner, H.R. & C.E.* v. *E.V. Kacherichamy* (1981) 2 M.L.J. 375) the learned counsel for the appellant contended that no notice under section 80, Civil procedure Code, is necessary for a statutory suit filed under section 70 of the Act. On the other hand, learned counsel for the contesting respondents, relying on a decision of the Supreme Court in *S.D.G. Pandarasannidhi* v. *State of Madras*, (1965) 2 M.L.J. (S.C) 167: (1965) 2 An. W.R. (S.C.) 167: (1965) 2 S.C.J. 711: (1965) 3 S.C.R. 17: A.I.R. 1965 S.C. 1578 and a decision of this Court in *Province of Madras* v. *Vikrama Deo*, (1943) M. W.N. 56: (1943) 1 M.L.J. 53: 56 L.W. 50: A.I.R. 1943 Mad 284 as well as a decision of the Bombay High Court in *Ebrahimbhai* v. *State*, A.I.R. 1975 Bom. 13 contended that the Commissioner, while functioning under the Act, functions only as a Public Officer or Government and that therefore, section 80, Civil Procedure Code, is attracted when a suit is filed against a Public officer in respect of any act purported to be done by such public Officer in his official capacity and the order passed is also

an act purported to be done by the public officer in his official capacity and the suit without notice under section 80, Civil Procedure Code, notice, is not maintainable. The learned counsel also relied on a decision of a single Judge of this Court in *Santhanagopala Chettiar* v. *Seetharama Chettiar* (1968) 2 M.L.J. 41 and contended that the Commissioner while functioning under the Act functions only as a Public Officer and the provisions contained in section 80, Civil Procedure Code, will apply to him.

6. The decision of the single Judge of this Court in *Santhanagopla Chettiar* v. *Seetharama Chettiar* (1968) 2 M.L.J. 41 came up on appeal before a Bench of this Court and the decision of the Bench is reported in *Santhanagopla Chettiar* v. *Seetharama Chettiar*, (1974) 1 M.L.J. 215. The question that arose therein was whether the temple is a denominational temple and the Court held that such a question is not coming under section 63 of the Act and so, the jurisdiction of the civil court is not ousted. Construing that the suit is one for declaration, that the temple is a denominational one, it was pointed out that the jurisdiction of the civil Court to decide that issue is not ousted. The implication of this judgment is that if it is a matter falling under section 63 of the Act, against which a statutory suit is provided under section 70 of the Act, no notice under section 80, Civil Procedure Code, is necessary before the filing of the suit. This aspect has come up for consideration before another Division Bench of this Court in another case and it is in *Lakshmana Shah* v. *Commr., H.R. & C.E.* (1971) 2 M.L.J. 495: 84 L.W. 828. In that case there was an application under section 57 (*b*) of the Madras Act 16 of 1951 before the Deputy Commissioner to hold that the office of the trustee of the suit temple was hereditary and the appellants are not hereditary trustees. The Deputy Commissioner had held that the office of trustee was hereditary and it was confirmed by the Commissioner. On a suit filed for cancelling the order of the Commissioner, it was held that 'no notice under section 80, Civil Procedure Code, is required in respect of a statutory suit to set aside or cancel the order of the Commissioner under the provisions of the Act. This Bench decision has been uniformly followed in a number of cases as seen from *Commr., H.R. & C.E.* v. *E.V. Kacharichamy*, (1981) 2 M.L.J. 375 and it has been held that for filing a statutory suit, no notice under section 80, Civil Procedure Code, is necessary.

7. The decision relied on by the learned counsel for the respondent in *Province of Madras* v. *Vikrama Deo*, (1943) 1 M.L.J. 53: 1943 M.W.N. 56 was a suit under section 14 of the Survey and Boundaries Act and the suit was filed only against the Government. The scope and scheme of the Survey and Boundaries Act are certainly not in *pari materia* with the scope and scheme of Tamil Nadu Act 22 of 1959. The other decision relied on by him in *Ebrahimbhai* v. *State*, A.I.R. 1975 Bom. 13 was again a suit against the Government filed under rule 13 (2), Schedule II of the Madhya Pradesh Land Revenue Code and being a suit against the Government, it was held therein that section 80, Civil Procedure Code, notice is necessary. In the absence of the State Act, *viz.*, Madhya Pradeeh Land Revenue Code, it is difficult to state whether the scope and scheme under that Act is analogous to the Madras Act 15 of 1949. Learned counsel for the respondent is unable to point out any decision arising under Tamil Nadu Act 15 of 1949 holding that even in respect of a statutory suit under section 70 of the Act, notice under section 80, Civil Procedure Code, is necessary for the maintainability of the suit.

8. Section 110 of Act 22 of 1959 provides that where a Commissioner or a Deputy Commissioner makes an enquiry or hears an appeal under Chapter V or Chapter VI the enquiry shall be made and the appeal shall be heard in accordance with the procedure applicable under the Code of Civil Procedure to the trial of suits or the hearing of the appeals. The provisions of the Indian Evidence Act and the Indian Oaths Act are also spplicable to such enquires or appeals. The order passed by the Deputy Commissioner under section 53 is a quasi-judicial order passed by him in exercise of his quasi-judicial functions. The appellate order passed by the Commissioner is also a quasi-judicial order passed by hin in exercise of his quasi-judicial function. In respect of enforcing the statutory remedy under aection 70 of the Act, the Deputy Commissioner or the Commissioner have passed quasi-judicial orders in exercise of their qasi-judicial functions and in that view' they cannot be termed to be public officers pufporting to act in their official capacity within the meaning of section 80, Civil Procedure Code. It therefore follows

that for enforcing the statutory right conferred under section 70 of the Act, notice under section 80, Civil Procedure Code, is unnecessary. Even without that notice, the suit is maintainable.

9. In the result, the appaeal is allowed, the finding of the trial Court on the preliminary issue is set aside and the suit is remitited back to the trial Court for trial on the other issues on merits. The parties are directed to bear their own costs in this appeal.

R.S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ramaswami and K. Shanmukham, JJ.*

M. Kandaswami Pillai .. *Appellant**

v.

Chinnaswamy and others .. *Respondents.*

Motor Vehicles Act (IV of 1939), sections 95 (1) and 96—Extent of liability of the Insurance Company—Motor Accident—Claim for damages upheld—Award passed against the owner of the vehicle only—Insurance company exonerated—Appeal by owner or the vehicle.

On the questions whether the injured and the deceased person in a motor accident who had got into the concerned lorry midway loading their goods and travelled seated in the cabin near the driver can be regarded as persons employed by a person insured by the insurance policy and whether the injury or death arose out of and in the course of employment so as to make the insurance company liable,

Held: Section 96 fastens a liability on the insurance company and also fixes its liability as equivalent to the liability suffered by the person by whom a policy has been effected with the said insurance company as required by section 95 (1) (*b*) but not exceeding the sum assured. Thus, section 96 does not throw any light as to the liability of the insurance company in a case where passengers are carried in a goods vehicle besides goods, It is section 95 (1) which provides the requirements of policies and limits of liabilities. The plain meaning of section 95 (1) will unmistakably convey that the insurance company will be liable in the following cases notwithstanding the terms in the insurance policy to the contrary. They are: (*a*) The insurance company will be liable in respect of death arising out of and in the course of his employment of the employee of the person insured by the policy. (*b*) The insurance company would be liable in respect of bodily injury sustained by such an employee arising out of and in the course of his employment, if it is a goods vehicle carrying passengers besides goods in the vehicle. In either case, the liability arising under the Workmen's Compensation Act, 1923 in respect of death of or bodily injury to any such employee is excluded. In this case, the lorry was exclusively intended to carry goods. On the evidence in this case it is not possible to hold that either the injured or the deceased was an employee of the appellant lorry owner who had insured his lorry with the insurance company and that either the injury or the death arose out of and in the course of his employment. [*Para.* 9.]

Section 95 (1) (*b*) (*i*) refers to cases where the accident involves the death or bodily injury of any person or damage to any property of a third party and is also caused by or arising out of the use of the vehicle in a public place; it is needless to state that 'vehicle' may be a generic term and will include all types of vehicles visualised under the Act inclusive of goods vehicle or lorry and public service vehicle. The said provisions do not cover the death of a person travelling in the vehicle itself. A reference to to section 96 (1) (*b*) (*ii*) will justify the above view. For the same specifically refers to death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place. [*Para.* 9.]

Cases referred to:—

Channappa v. *Laxman*, A.I.R. 1979 Karn 93; *United Insurance Co., Ltd.* v. *Gangamma* A.I.R. 1982 Karn. 261; *Narayanan* v. *Madras State Palm Gur Sammelan*, (1974) 8 L.W. 395: A.I.R. 1974 Mad. 281; *Common*-

* A.A.O. No. 645 of 1980. 19*th March*, 1984.

wealth Assurance Co., Ltd. v. *Rahim Khan Sahib*, (1971) A.C.J 295: 41 Comp. Cas, 727: (1971) 84 L.W. 387: A.I.R. 1971 Mad. 415; *Vanguard Insurance Company* v. *Chinnammal*, (1970) 1 M.L J. 542: 83 L.W. 47: (1969) A.C.J. 226: A.I.R. 1970 Mad. 236; *Nasildar* v. *M/s. Adhia & Company*, A.I.R. 1984 Bom. 1.

Appeal against the order of the Motor Accidents Claims Tribunal (II Addl. Sub-Judge), Cuddalore dated 3rd May, 1980 and made in Claims Petitions Nos, 85 and 137 of 1978.

R. Mohan, for Appellant.

R. Sundaravaradhan, Kurian, Arumugham and *Joseph, Dhanakumar, T.S. Seetharaman*, and *S.A. Rajan*, for Respondents.

The Judgment of the Court was delivered by

Shanmukham, J.—The motor accident that took place on 22nd Feburary, 1979 near Pillur village, south of Ulundurpet in Grand Trunk Road, had given rise to three claim petitions, O.P. Nos.85, 133 and 137 of 1979 before the Motor Accidents Claims Tribunal, Cuddalore. The Tribunal rendered a common judgment in all the three proceedings. The two appeals are directed against the award passed by the Tribunal in O.Ps. Nos. 85 and 137of 1979 respectively. The appellant in both the appeals is the owner of the lorry which was involved in the accident and1st respondent in the former is the claimant before the Tribunal, while respondents 1 to 7 are the claimants in the latter. The 2nd respondent is the insurance company which ranked as 2nd respondent even before the Tribunal.

2. The Tribunal found that the accident happened due to rash and negligent driving of the lorry M.D.G. 1609; it awarded Rs. 13,300/-, to the 1st respondent in C.M.A. No. 645 of 1980, because his hand was crushed and ultimately, his left hand had to be amputated and also he suffered multiple injuries, made up of Rs. 10,000 as compensation for the permanent disability suffered by the injured, Rs. 300 towards loss of income for a period of two months at Rs. 150 per month, Rs. 3,000 as compensation for pain and suffering. In the other proceeding, the Tribunal gave an award for Rs. 20,600 made up of 16,100 being compensation for loss of dependency and Rs. 4,500 as compensation to the deceased's wife. The Tribunal directed the owner of the vehicle the appellant before us to pay compensation to the injured and to the heirs of the deceased respectively, but dismissed the claim as against the insurance company.

3. Learned counsel for the appellant made two submissions. The first is that the Tribunal erred in exonerating the insurance company from liability. In this context, the learned counsel submitted that the Tribunal had not made a proper construction of section 95, particularly the proviso attached thereto and section 96 of the Motor Vehicles Act, while the second is directed against the quantum of compensation awarded by the Tribunal.

4. Let us take up the second point in the first instance. The injured (1st respondent in C.M.A. No. 645 of 1980) was discharged from Government Hospital, Perambalur only on 20th April, 1979 as seen from Exhibit A-7. Thus, it is established that for nearly two months, he was lying in the hospital undergoing treatment. It is not in dispute that his left fore-arm had been amputated in the Government Hospital at Cuddalore and consequently, he had suffered a permanent disability. The Tribunal had fixed only Rs 3,000 as compensation for his suffering and mental agony, while it fixed Rs. 10,000 as compensation for permanent disability. Except contending that the compensation awarded is excessive, the learned counsel could not make any effective argument. It is found that this claimant is aged about 32 years and on account of the accident, lost his left hand below hir elbow. Considering his age, we hold the compensation awarded for permanent disability cannot be said to be excessive; so too, considering the duration of his suffering and his stay in the hospitals, we are unable to hold that the sum of Rs. 3,000 awarded as compensation for mental agony and suffering is excessive. The third item related to the loss of income for the period of two months during which this claimant was laid up in the hospital for treatment. The Tribunal assessed the salary of the claimant at Rs. 5 per day and thus, fixed the compensation in the sum of Rs. 300 for two months. It is no gainsay that even in 1979, any ordinary coolie was earning

more than Rs. 5 a day, even in a village. Thus, we see no justification to interfere with such a factual finding rendered by the Tribunal.

5. As regards the quantum awarded to the heirs of the deceased Sengan who lost his life in the accident, we have to hold that such assessment by the Tribunal can hardly be assailed on the evidence placed before it. The deceased was an agricultural labourer. The Tribunal fixed his average income at Rs. 6 per day and therefore, evaluated his monthly income at Rs. 180. Allowing a margain of Rs. 80 for his maintenance and expenses, it assessed that he would have shared the balance of Rs. 100 to his family. Thus, his annual income was fixed at Rs. 1,200. The duration of the loss of dependency was fixed at 13 years. As the evidence in this case revealed that his age was varying from 45 to 52, the Tribunal fixed his age at 50 years. Assessing the expectancy of the deceased as 65 years, it fixed the compensation at Rs. 18,000 (15 years at Rs. 1,200 per year) as loss of dependency. It awarded Rs. 4,500 to his wife for the loss of her husband's society. We had earlier indicated that the earning capacity of an agricultural labourer even in 1979 was not less than Rs. 5 per day. Then, we do not find any error in the Tribunal fixing the daily income of the deceased at Rs. 6 per day; so too as regards the expectancy of life the assessment made by the Tribunal is beyond challenge. Thus, we hold that the compensation awarded by the Tribunal can hardly be interfered with. We may add that the appellant is rather fortunate in that neither the injured nor the heirs of the deceased had challenged the quantum by preferring an independent appeal or cross-objection.

6. To appreciate the first point, certain admitted facts have to ba noticed. The injured and the deceased had got into the lorry midway, loaded their goods in the lorry and also travelled in that lorry being seated in the cabin near the driver. The contention of the insurance company which found favour with the Tribunal is that the policy of insurance does not cover persons like the injured and the deceased travelling in a lorry. In this context, it relied upon Exhibit B.4, the policy of insurance bearing No. 426314518. Learned counsel for the appellant contended that a proper construction of section 95 of the Motor Vehicles Act will reveal the approach made by the Tribnnal is erroneous. A great emphasis is laid on the decision of the Karnataka High Court in *Channappa* v. *Laxman*, A.I.R. 1979 Karnataka 93 and *United Insurance Co., Ltd* v. *Gangamma*, A.I.R. 1982 Karnataka 261 which followed the former ruling of that Court without any further detailed discussion.

7. Before we examine, the said contention, we must state that a Division Bench of this Court in *Narayanan* v. *Madras State Palm Gur Sammelan* (1974) (87 L.W. 395: A.I.R. 1974 Mad 281 had held that,

> "A passenger carried by a lorry will not be covered by the Insurance Policy unless he is proved to be a passenger travelling by reason of or in pursuance of a contract of employment. If the person was not in employment, and if he was travelling without authorisation, there is no provision in the Act to protect such a person. The rules framed under the Motor Vehicles Act prohibit travel by any person as a passenger in a goods vehicle. Under the circumstances, there is no ground for fastening any liability on the insurer or on the owner of the vehicle for the injuries sustained by a person who was travelling without authority in the lorry and who sustained injuries due to the negligence of the driver."

Accordingly, the Bench observed, under the circumstances, we see no ground for fastening any liability on the insurer or on the owner of the vehicle for the injuries sustained by the person who was travelling without authority in the lorry and sustained injuries due to negligence of the driver. As a matter of fact, the Division Bench had agreed with the view of a learned Single Judge who had considered this question elaborately in *Common Wealth Assurance Co., Ltd.* v. *Rahim Khan Sahib*, (1971) 84 L.W. 387: (1971) A.C.J. 295: 41 Com. Cas. 727: A.I.R. 1971 Mad 415. It may be useful to refer to another decision of this Court rendered by a learned Judge reported in *Vanguard Insurance Compauy* v. *Chinnammal* (1970) 1 M.L.J. 542: 83 L.W. 47; (1969) ACJ 226: A.I.R. 1970 Mad. 236. No doubt, the learned Judge has held,

> "Though on a superficial view of section 95 it might appear that the words "contract

of employment" found therein would cover only a contract of employment with the owner of the insured vehicle, it would cover not only such personsbut also persons who are on the vehicle in pursuance of a contract of employement with the owner of the goods carried in it. What is necessary is that for sufficient practical or business reasons, the person must be on the vehicle in pursuance of a contract of employment. If he is such a person, any injury caused to him would also be covered by the section. A.I.R. 1967 Pun. 486 Rel. on."

It is needless to state that in view of the Bench decision of this Court referred to supra, the learned Judge's view in *Vanguard Insurance Company* v. *Chinnammal*, (1970) 1 M.L.J. 542: 83 L.W. 47: (A.I.R. 1970 Mad. 236) is no longer good law. Secondly, the Full Bench decision relied on by the learned Judge held to the contrary, because the ratio that was laid down therein is that.

"The deceased persons as hirers-cum-owners of the goods did not come under clause (*ii*) of the proviso to section 95 (1) (*b*). So the policy was not one that was required to cover liability under clause (*b*) of sub-section (1) of section 95. It was open to the insurer to prove that. This is not barred by any provision of section 96 and in fact, section 96 proceeds on the basis that such a policy under section 95 (1) (*b*) is required.

That the hirers were not on the truck by reason of or in pursuance of a contract of employment because they were not employed by anybody to go on the truck but were on it as owners of the goods carried in it."

8. As the argument related to the construction of sections 95 and 96 of the Motor Vehicles Act, we extract such relevant parts that are necessary for our present consideration :—

"95 (1). In order to comply with the eequirements of this Chapter, a policy of insurance must be a policy which -(*b*) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2) (*i*) against any liobility which may be incurred by him in respect of the death of or bodily injury to any person or damage to any property of a third party cnused by or out of the use of the vehicle in a public place;

(*i*) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place; Provided that a policy shall not be required

(*ii*) to cover liability in respect of the death, arising out of and in the course of his employement, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923, in respect of the death of, or bodily injury to, any such employee—

(*c*) if it is a goods vehicle, being carried in the vehicle

(2) Subject to the proviso to sub-section

(1) a policy of insurance shall cover any liability incurred in respect of any one accident upto the following limits, namely :—

(*a*) Where the vehicle is a goods vehicle, a limit of fifty thousand rupees in all including the liabilities, if any, arising under the Workmen's Compensation Act, 1923 in respect of the death of, or bodily injury to, employees (other than the driver), not exceeding six in number, being carried in the vehicle;

96 (1), If, after a certificate of insurance has been issued under sub-section (4) of section 95 in favour of the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under clause (*b*) of sub-section (1) of section 95 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the

provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment-debtor, in respect of the liability together with any amount payable in respect of costs and any sum payable in respect interest on that sum by virtue of any enactment relating to interest on judgments".

9. Section 96 fastens a liability on the insurance company and also fixes its liability as equivalent to the liability suffered by the person by whom a policy has been affected with the said insurance company as required by section 95 (1) (*b*), but not exceeding the sum assured. Thus, section 96 does not throw any light as to the liability of the insurance company in a case where passengers are carried in a goods vehicle besides goods. It is section 95 (1) which provides the requirements of policies and limits of liabilities. The plain meaning of section 95 (1) extracted supra will unmistakably convey that the insurance company will be liable in the following cases notwithstanding the terms in the insurance policy to the contrary. They are: — (*a*) The insurance company will be liable in respect of death arising out of and in the course of his employment of the employee of a person insured by the policy. (*b*) The insurance company would be liable in respect of bodily injury sustained by such an employee arising out of and in the course of his emploment, if it is a goods vehicle goods being carried in the vehicles. In either case, the liability arising under the Workmen's Compensation Act, 1923 in respect of death of, or bodily injury to any such employee is excluded. In this case, it is a lorry exclusively intended to carry goods. The immediate question is whether either the injured or the deceased who travelled in the lorry along with their goods, can be said to be employed by a person insured by the policy and either the injury or death arose out of and in the course of his employment. On the evidence in this case, it is not possible to hold that either the injured or the deceased was an employee of the appellant-lorry owner who had insured his lorry with the insurance company and that the injury or the death arose out of and in the course of his employment. We shall emphasize here that on the evidence, it is established that both the injured and the deceased got into the lorry midway. The evidence of P.W.1 only establishes that both loaded their 102 bags and 3 bags of chillies respectively in the lorry at Alathur gate on the date of the accident, that they were also travelling in the cabin accompanying their goods, that they proposed to get down at Madapattu, but then the lorry met with the accident due to rash and negligent driving near Pillur village. On the above evidence, it is too difficult to infer even an implied contract of employment between the appellant-owner of the lorry and either of the injured or the deceased, Section 95 (1) (*b*) (*i*) refers to cases where the accident involves the death or bodily injury of any person or damage to any property of a third party and is also caused by or arising out of the use of the vehicle in a public place; it is needless to state that the vehicle may be a generic term and will include all types of vehicles visualised under the Act inclusive of goods vehicle or lorry and public service vehicle. The said provision does not cover the death of a person travelling in the vehicle itself. A reference to section 95 (*b*) (*ii*) will justify our above view. For, the same specifically refers to death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place. Thus, we find that the provisions in the Act do not by themselves support the contention advanced by the learned counsel for the appellant.

10. We must add here that the covenant in the policy of insurance marked as Exhibit B-4 is in consonence with the above provisions. The particular clause provides:

"Except so far as is necessary to meet the requirements of section 95 of the Motor vehicles Act, 1939, in relation to liability under the Workmen's Compensation Act, 1923, the company shall not be liable in respect of death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or mounting or alighting from the Motor Vehicle at the time of the occurrence of the event out of which any claim arises."

Quite rightly therefore the Tribunal held both in law and under policy of insurance, the insurance company is not liable to the claims made in those proceedings.

11. Regarding the decision of the Karnataka High Court, we have to point out that the

learned Judges were principally influenced by rule 161 (1) which was perhaps applicable to the Karnataka State. We must immediately state that the Tamil Nadu rules do not contain any such rule. Rule 161 (1) applicable to Karnataka State runs thus:—

> "161 *Carriage of persons in goods vehicles.*—Subject to the provisions of this rule, no person shall be carried in a goods vehicle:
>
> Provided that the owner or the hirer or a *bona fide* employee of the owner or the hirer of the vehicle may be carried in a goods vehicle, the total number of persons so carried in a light transport goods vehicle not being more than three and in any other goods vehicle, not being more than seven including the driver".

That is obvious from the following observations found in that Judgment:—

> "The proviso to rule 161 (1) of the Rules since specifically authorises the use of the goods vehicle for carrying the owners of goods carried in the vehicle as passengers, it cannot be said that the vehicle which carries such passengers is not the one covered by a permit to ply for hire or reward. In the said view of the matter, the term relating to the limitation of liability contained in the policy adverted to by us, does not enable the insurer to escape its liability for the risk of the owner of the goods "

Learned counsel for the appellant just at the time of delivering the judgment cited a decision of a Division Bench of the Bompay High Court reported in *Nasibdar* v. *M/s. Adhia & Company* A.I.R. 1984 Bom. 1. First of all, on our construction we found that the provisions by themselves do not support the contention advanced by the learned counsel for the appellant. Secondly, we had followed a Division Bench of this Court which has held the field all the while. These therefore refrain us from following the decision of the Bombay High Court. Even in this case, it is relevant to notice that the Bombay High Court relied upon rule No. 118. According to the said rule, if any of the following persons travelling by a goods vehicle, (*a*) the ower, (*b*) the hirer, (*c*) the police officers in uniform travelling on duty, and (*d*) the *bona fide* employees of the owner or hirer who are being carried by the goods vehicles free of charge, should suffer injury or meet with his death, the injured or heirs of the deceased as the case may be, are entitled to claim compensation even from the insurance company. No such rule is in force in Tamil Nadu.

12. In the circumstances, we are unable to take any guidance from the decision referred to supra. The recent decision of the Karnataka High Court has simply followed its previous decision but without any ressoning whatever. Thus, the appellant cannot call to his aid the rulings of the Karnataka High Court as supporting his contentions.

13. In the result, both the points fail. The appeals are therefore dismissed with costs.

The order of the Court was pronounced by

Shanmukham, J.—The oral request made by the learned counsel for the appellant for leave to appeal to the Supreme Court is turned down because this case does not involve a substantial question of law of general importance, nor does the question, in our opinion, need to be decided by the Supreme Court.

R.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT:—*P. R. Gokulakrishnan, O.CJ. and David Annoussamy J.*

The State of Tamil Nadu represented by the Secretary to Government, Housing Department, Fort St., George, Madras-5. ... *Appellant**

v.

N. Thangavelu .. *Respondent.*

Land Acquisition Act (I of 1894), section 4 (1)—State seeking to acquire land—Notification under section 4 (1)—Notification published in Gazette on 18th July, 1973—Substance of notification not published in the locality where the land is situated simultaneously—Publicaiion only on 24th September, 1973—Notification quashed.

Held: It is clear from the facts of the case that the notification under section 4 (1) of the Act for the acquisition of the land in question was published in the gazette on 18th July, 1973, but the substance of the notification regarding the acquisition of the land was published in the locality where the land is situated only on 24th September, 1973. If the Collector fails to cause public notices of the substance of the notification to be given at simultaniously convenient places in the locality where the land sought to be acquired is situated, the whole acquisition proceedings are vitiated. There is a clear violation of the mandatory provisions of the Act and as such the notification under section 4 (1) of the Act is vitiated. *Narinderjit Singh* v. *State of U.P.*, A.I.R. 1973 S.C. 552, followed.

[*Para.* 2.]

* W.A. No. 97 of 1979 against W.P. No. 6667 of 1973. 11*th June*, 1984.

Case referred to:—

Harinderjit Singh v. *State of U.P.*, (1973) 2 S.C.J. 378: (1973) 1 S.C.C. 157: A.I.R. 1973 S.C. 552.

Appeal under Clause 15 of the Letters Patent against the Order of Mr. Justice Koshal dated 16th November, 1976 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 6567 of 1973 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records in G.O.R. No. 291, Housing dated 29th June, 1973 of the State of Tamil Nadu published as II. I. No. 3248 of 1973, quash the said order dated 29th June, 1973 of the State of Tamil Nadu.

The Government Pleader, for Appellant.

The Judgment of the Court was delivered by

Gokulakrishnan, Officiating C. J:—This writ appeal is filed by the Government against the order made in W.P. No. 6667 of 1973. In this writ petition the petitioner herein (respondent herein) prayed for the quashing oi the notification under section 4 (1) of the Land Acquisition Act. By the said proceedings the land of the respondent herein was sought to be acquired by the State of Tamil Nadu. The acquisition was notified under section 4 (1) of the Act in the Ofticial Gazette on 18th July, 1973. The substance of the notification, however, was not published in the locality where the land is situated till as late as 24th September, 1973. Hence the respondent herein came to Court by way of a writ of *certiorari* to quash the notification under section 4 (1). The learned single Judge of this Court quashed the notification holding that the substance of the notification had not been stimultanaously published in the locality where the land is situated. It is as against this order the present writ appeal has been filed.

2. It is clear from the facts of the case that the notification under section 4 (1) of the Act for acquisition of the land in question was published in the gazette on 18th July, 1973, but the substance of the notification regarding the acquisition of the land was published in the locality where the land is situated only on 24th September, 1973. In *Narinderjit Singh* v. *State of U.P.*, (1973) 2 S.C.J, 378: (1973) 1 S.C.C. 157: A.I.R. 1973 S.C. 552, the Supreme Court has held that, where the Collector fails to cause public notice of the substance of the notification to be given at convenient places in the locality where the land sought to be acquired is situated, the whole acquisition proceedings are vitiated. While discussing this aspect of the case, the Supreme Court has held as follows:—

> "Section 4 (1) does not contemplate any distinction between those proceedings in which in exercise of the power under section 17 (4) the appropriate Government directs that the provisions of section 5-A shall not apply and where such a direction has not been made dispensing with the applicability of section 5-A. It lays down in unequivocal and clear terms that both things have to be simultaneously done under section 4 (1), *i.e.*, a notification has to be published in the official gazette that the land is likely to be needed for any public purpose and the Collector has to cause notice to be given of the substance of such notification at convenient place in the locality in which the land is situated".

Thus there has been a clear violation of the mandatory provisions of the Act and as such the notification under section 4 (1) of the Act is vitiated. We are therefore in complete agreement with the order of the learned Judge. Accordingly the writ appeal is dismissed. There will, however, be no order as to costs.

R.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—*V. Ratnam, J.*

C. Kuppuswamy Naidu ... *Petitioner**

v.

V. Krishtappa Chetty (died) and another ... *Respondents.*

Tamil Nadu Buildings (Lease and Rent Control) Act (18 *of 1960*), *as amended by Act* (*XXIII of 1973*), *sections* 10 (3) (a) (ii) *and* 10 (3) (c)—*Scope and applicablity—Non-residential building—Room let only for keeping cycles — Landlord keeping vehicles in portion occupied by him for residence—Petition for eviction by landlord—Requirement of tenant's room for the purpose of keeping vehicles belonging to his son—Landlord entitled to get an order of eviction.*

Under section 10 (3) (*a*) (*ii*) of the Tamil Nadu Buildings (Lease and Rent Control) Act, a landlord is enabled to seek an order of eviction with reference to a non-residential building used for the purpose of keeping a vehicle or adapted for such use. No question of adaptation of the building in question for the purpose of keeping a vehicle arises in this case as it is not disputed that the premises is used for keeping cycles. The further requirement of that provision is that the landlord requires it for his own use or for the use of any member of his family and that he or any member of his family is not in occupation of any such building. It was not the case of the petitioner that the landlord or any member of his family is in occupation of a non-residential building used or adapted for use for the purpose of keeping vehicles. Plainly, therefore, subject to establishing his requirement for his use or for the use of any member of his family, the respondent would be ordinarily entitled to an order of eviction under section 10 (3) (*a*) (*ii*) of the Act. The contention, however, is that since the landlord is in occupation of a building for residential purposes, his remedy would be to proceed under section 10 (3) (*c*) of the Act and pray for additional accommodation, in which case, under the proviso following section 10 (3) (*c*) of the Act, the relative hardship would also be a relevant circumstance, which when considered, may even result in the dismissal of the application for eviction. Section 10 (3) (*c*) of the Act contemplates occupation by the landlord of

* C.R.P. No. 3757 of 1982. *27th August, 1984.*

a part of a building, whether, residential or non-residential and his requiring further accommodation in addition to what he has already. In such a situation, notwithstanding section 10 (3) (*a*) (*i*) to (*iii*) of the Act, it would be open to the landlord to apply for an order directing the tenant in occupation of the whole or any portion of the remaining part of the building to put the landlord in possession thereof, if he requires additional accommodation for residential purposes or for purposes of a business which he is carrying on, as the ease may be. The use of non-obstants clause in section 10 (3) (*a*) of the Act clearly shows that it would apply even in cases where section 10 (3) (*a*) of the Act does not stand attracted. In other words, a landlord not entitled to apply for eviction under section 10 (3) (a) of the Act may, nevertheless, invoke section 10 (3) (*c*) of the Act and apply for eviction. Therefore while dealing with an application under section 10 (3) (*a*) (*ii*) of the Act the considerations which would be relevant to an independent right to secure additional accommodation under section 10 (3) (*c*) of the Act cannot be inserted into section 10 (3) (*a*) (*ii*) of the Act. Besides, from the provisions of the Act, despite the distinction made between residential and non-residential buildings, it is manifest that a premises used for keeping a vehicle is treated as a non-residential building. It is also further seen from section 10 (3) (*c*) of the Act that to secure additional accommodation whether of residential or non-residential building, the requirement of the landlord must be for residential purposes or for purposes of a business. This postulates that additional accommodation of a non-residential building, as we have in this case, can be had under section 10 (3) (*c*) of the Act only for purposes of business which the landlord was carrying on and since in this case the landlord is admittedly not carrying on any business, he cannot apply under seetion 10 (3) (*c*) of the Act for an order of eviction in respect of a non-residential building for the purpose of keeping his vehicles. [*Para*. 6.]

Cases referred to:—

Jawanthrai Mehta v. Ramachandra Chetty, (1965) 78 L.W. (Sh.N.) 65: *M/s. M. Thiwpathi Nadar and Sons v. Dr. S.L. Kantha Rao*, (1980) T.L.N.J. 145.

R.S. Venkatachari, for Petitioner.

M. Venkatachalapathy Counsel, for Respondent No. 2

The Court made the following

ORDER:—The tenant is the petitioner in this Civil Revision Petition, which is directed against the order of eviction passed against the petitioner by the authorities below on an application taken out by the deceased first respondent herein under section 10(3) (*a*) (*ii*) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 18 of 1960, as amended by Act 23 of 1973 (hereinafter referred to as 'the Act'). The deceased first respondent herein was the landlord of a room in the occupation of the petitioner and situate in No. 66, Sattanna Naicken Street, Vepery, Madras-7. The petitioner has been using that room for the purpose of keeping cycles. Claiming that the premises in the occupation of the petitioner was required for the purpose of keeping the vehicles, namely, scooter and cycles belonging to his son, the deceased first respondent issued a notice on 25th November, 1980 demanding vacant possession of the premises by 1st January, 1981 and since that was not complied with, the deceased first respondent filed H.R.C. No. 3232 of 1981 before the Rent Controller (XIV Judge, Court of Small Causes), Madras, under section 10 (3) (*a*) (*ii*) of the Act praying for an order of eviction against the petitioner.

2. In the counter filed by the petitioner, in opposition to the application for eviction, he contended that owing to the refusal by the deceased first respondent to receive rents, proceedings had to be taken in H.R.C. No. 614 of 1981 that there was a demand for enhanced rent by the deceased first respondent herein at the rate of Rs. 100 per mensem and the petitioner refused to accede to such a demand and that led to the filing of the application for eviction and therefore, the requirement was not *bona fide*. Besides, the petitioner also put forth the plea that sufficient space was available for the purpose of parking the vehicles and that having regard to the non-residential nature of the premises where the petitioner was carrying on business, the deceased first respondent was not in order in seeking an order for eviction on the ground that he *bona fide* required the premises for keeping the vehicles of his son and the petitioner, therefore, prayed for the dismissal of the application for eviction.

3. Before the learned Rent Controller (XIV Judge, Court of Small Causes), Madras on

behalf of the deceased first respondent, his son was examined as P.W. 1 and Exhibits P-1 to P-4 were marked, while, on behalf of the petitioner, he was examined as R.W. 1 and Exhibits R-1 to R-4 were filed. On a consideration of the oral as well as the documentary evidence, the learned Rent Controller found that the son of the deceased first respondent owned scooter as well as cycles, that no separte space was available to keep those vehicles, that the application filed by the deceased first respondent under section 10 (3) (*a*) (*ii*) of the Act was maintainable and that his requirement was *bona fide*. On the aforesaid conclusions, an order for eviction was passed against the patitioner. Aggrieved by this, the petitioner preferred an appeal in R.C.A. No. 188 of 1982 before the Appellate Authority (IV Judge, Court of Small Causes), Madras. The Appellate Authority, on a reconsideration of the evidence, concluded that the son of the deceased first respondent was keeping his vehicles in the portion occupied by him for residential purposes, that section 10 (3) (*a*) (*ii*) of the Act would stand attractes and section 10 (3) (*c*) of the Act would be inapplicable and that the requirement of the deceased first respondent was nothing but *bona fide*. In view of these findings, the Appellate Authority upheld the order of eviction and dismissed the appeal. It is the correctness of this order that is challenged in this Civil Revision Petition.

4. During the pendency of the Civil Revision Petition, the landlord Krishtappa Chetty, who initiated the proceedings, died and in C.M.P.No. 575 of 1984 taken out by the petitioner, Sri Kannan (P.W. 1) was brought on record as the legal representative of the deceased first respondent Krishtappa Chetty for purposes of prosecuting the further proceedings.

5. The learned counsel for the petitioner first contended that the application for eviction filed under section 10 (3) (*a*) (*ii*) of the Act was not maintainable, as, on the facts of this case, the appropriate section that would be applicable is, section 10 (3) (*c*) of the Act in which case, the question of relative hardship has also to be adverted to and considered. On the other hand, the learned counsel for the respondent, submitted that having regard to the admitted non-residential user of the premises by the petitioner for keeping cycles therein, there is no question of the respondent seeking additional accommodation under the Act, when the respondent was in occupation of a building for residential purposes and that section 10 (3) (*a*) (*ii*) of the Act provides for a situation where a landlord is enabled to recover possession of a premises used for non-residential purposes, namely, keeping the vehicles irrespective of whether he is in possession of other premises. In this connection reliance was also placed by the learned counsel upon the decision in *Jawanthari Mehta* v. *Ramachandra Chetty* (C.R.P. Nos. 1294 and 1893 of 1962.

6. Before proceeding to embark upon a consideration of the aforesaid contention, it is necessary to notice a few undisputed facts. The petitioner is keeping cycles in the premises in his occupation. The respondent is keeping his vehicals in the portion occupied by him for purposes of residence. The petitioner has also further admitted that there is no separate space available in the premises under the occupation of the respondent to keep his vehicles. The ownership of the scooter as well as two cycles by the respondent is also not in dispute. Equally, there is no dispute that the premises in the occupation of the petitioner is a non-residential building used for the purpose of keeping cycles and that the respondent is not occupying any such non-residential building for the purpose of keeping his vehicles. Under section 10 (3) (*a*) (*ii*) of the Act, a landlord is enabled to seek an order of eviction with reference to a non-residential building used for the purpose of keeping a vehicle or adapted for such use. No question of adaptation of the building in question for the purpose of keeping a vehicle arises in this case as it is not disputed that the premises is used for keeping cycles. The further requirement of that provison is that the landlord requires it for his own use or for the use of any member of his family and that he or any member of his family is not in occupation of any such building. It is not the case of the petitioner that the respondent or any member of his family is in occupation of a non-residential building used or adapted for use for the purpose of keeping vehicles. Plainly, therefore, subject to establishing his requirement for his own use or for the use of any member of his

family, the respondent would be ordinarily entitled to an order of eviction under section 10 (3) (*a*) (*ii*) of the Act. But what is contended on behalf of the petitioner is that since the respondent is in occupation of a building for residential purposes, his remedy would be to proceed under section 10 (3) (*c*) of the Act and pray for additional accommodation, in which case, under the proviso following section 10 (3) (*c*) of the Act, the relative hardship would also be a relevant circumstance, which, when considered, may even result in the diamisal of the application for eviction. Section 10 (3) (*c*) of the Act contemplates occupation by the landlord of a part of a building, whether residential or non-residential, and his requiring further accommodation is addition to what he has already. In such a situtation, notwithstanding section 10 (3) (*a*) (*ii*) to (*iii*) of the Act, it would be open to the landlord to apply for an order directing the tenant in occupation of the whole or any portion of the remaining part of the building to put the landlord in possession thereof, if he requires additional accommodation for residential purposes or for purposes of a business which he is carrying on, as the case may be. This is well settled by the decision of the Division Bench of this Court in *M/s. Tirupathi Nadar and Sons* v. *Dr. S L. Kantha Rao*, (1980) T.L.N.J. 155. The use of *non-obstance* clause in section 10 (3) (*a*) of the Act clearlry shows that it would apply even in cases where section 10 (3) (*a*) of the Act does not stand attracted. In other words, a landlord not entitled to apply for eviction under section 10 (3) (*a*) of the Act may nevertheless invoke section 10 (3) (*c*) of the Act and apply for eviction. Therefore, while dealing with an application under section 10 (3) (*a*) (*ii*) of the Act, the consideration which would be relevant to an independent right to secure additional accommodation under section 10 (3) (*c*) of the Act cannot be imported into section 10 (3) (*a*) (*ii*) of the Act. Besides, from the provisions of the Act, despite the distinction made between residential and non-residential buildings, it is mainfest that a premises used for keeping a vehicle is treated as a non-residential building. It is also further seen from section 10 (3) (*c*) of the Act that to secure additional accommodation, whether of residential or non-residential building, the requirement of the landlord must be for residential purposes or for purposes of a business. This postulates that additional accommodation of a non-residential building, as we have in this case, can be had under section 10 (3) (*c*) of the Act only for purposes of business which the landlord was carrying on and since in this case the landlord is admittedly not carrying on any business, he cannot apply under section 10 (3) (*a*) of the Act for an order of eviction in respect of a non-residential building for the purpose of keeping his vehicles. It is thus obvious that no application under section 10 (3) (*c*) of the Act could have been made. That this is so is laid down in *Jawanthraj Mehta* v. *Ramachandra Chetty*, (1965) 78 Law Weekly (Short Notes) 65. In that case, the landlord was residing in the first-floor and the tenants were in occupation in the ground-floor in two portions and with reference to that building an application was made under section 10 (3) (*a*) (*ii*) of the Act for the purpose of adapting the same as a garage to park the car as well as the cycle-rickshaw of the landlord. The Rent Controller was of the view that the application made by the landlord should be considered as one for additional accommodation under section 10 (3) (*c*) of the Act and taking into account the relative hardship, it was found it would cause undue hardship on the tenant than the advantages that may accrue to the landlord and on that conclusion, the application for eviction was dismissed. On appeal, the Appellate Authority however upheld the contention of the landlord that the application was sustainable under section 10 (3) (*a*) (*ii*) of the Act and found that the requirement was also *bona fide*. Yet, the application for eviction was dismissed in part on the ground that there was no necessity to direct possession of both the rooms as the cycle-rickshaw could be parked elsewhere and car alone required to be parked in one of the rooms. The order so passed was challenged by the landlord as well as the tenant. One of the contentions urged was that the remedy of the landlord was by way of an application undes section 10 (3) (*c*) of the Act and not under section 10 (3) (*a*) (*ii*) of the Act. Dealling with this contention Natesan, J., pointed out that while the Act makes a distinction between residential and non-residential buildings, there are no specific definitions and, therefore, guided by the ordinary usage and connotation it was clear that a premises used for keeping vahicles is treated as non-residential building and that under section 10 (3) (*c*) of the Act,

the additional accommodation could be for either residential or non-residential purpose and as such the landlord could apply for additional accommodation under section 10 (3) (*c*) of the Act only for purposes of a business which he is carrying on and he cannot under that provision apply for a non-residential building for purposes of keeping his vehicle. This decision would squarely apply to the facts of this case to hold that the application filed by the landlord under section 10 (3) (*a*) (*ii*) of the Act was quite in order and rightly entertained by the authorities below. There is, therefore, no substance in the first contention of the learned counsel for the petitioner.

7. The learned counsel for the petitioner next contended that the requirement of the landlord was not *bona fide* at all as he was only anxious to ensure enhanced rent from the petitioner and did not genuinely require the premises in question for parking the scooter and the cycles. On the other hand, the learned counsel for the respondent would contend that the petitioner is not consistent at all in his case with reference to the so-called demand for payment of higher rent and that there is absolutely no material in support thereof and, therefore, the conclusion of the authorities below that the requirement is *bona fide* does not deserve to be disturbed. It is seen from the evidence as to the two cycles that he has no separate space to park those vehicles. In view of this admission of the petitioner himself, the *bona fides* of the requirement are clearly made out. Whether there was any demand for enhanced rent which would detract from the *bona fide* has next to be considered. It is seen from Exhibit P-1 that the landlord issued a notice to the petitioner stating that the monthly rental in respect of the premises is Rs. 80 and thet he requires the premises in the occupation of the petitioner for keeping his son's vehicles. Exhibit P-2 in the reply sent by the petitioner to Exhibit P-1. Therein, the petitioner states that the monthly rent pyable by him is only Rs. 40 and not Rs. 80 and that certain payments are made in accordance therewith. The requirement for the purpose of keeping the vehicles of the son of the landlord is denied. It is further seen from Exhibit P-2 that though the petitioner stated that the landlord had made a claim falling under section 10 (3) (*a*) (*ii*) of the Act with a view to somehow evict the petitioner, that was only because the petitioner had not agreed to the demand to pay an enhanced rent. The petitioner has not stated how much was demandad by the respondent and when. In the counter, the petitioner would say that a higher rent at Rs. 100 per mensum was demanded. Examined as R.W. 1, the petitioner would say that the landlord demanded rent at Rs. 80 per mensem. There is no dispute that after the exchange of Exhibits P-1 and P-3, an application in H.R.C. No. 614 of 1981 was filed by the petitioner and rents had been deposited at the rate Rs. 40 per mensem pursuant to the orders pasrsd therein and this is established by Exhibit P-1 produced by the petitioner. There is no evidence, to show that subsequent to the passing of the order in H.R.C. No. 614 of 1981 and prior to the filing of application for eviction on 15th July, 1981, there was any demand whatever for payment of enhanced rent by the petitioner. If really there was such a demand and landlord had refused to receive the rent. one would have normally expected the petitioner to have issued a notice calling upon the landlord to receive the rent or informing him that he will resort to the remedies provided under the Act for payment or deposit of the rents. In the absence of evidence of steps taken by the petitioner, it is obvious that the so-called demand for enhanced rent at the rent of Rs. 100 per mensem is a total myth. The authorities below have adverted to the evidence in relation to the demand stated to have been made by the landlord for enhanced rent and have found that it is not made out by the evidence on record. It, therefore, follows that the authorities below were quite in order in having pronounced upon the *bona fide* requirement of the landlord for the purposes of keeping the scooter and the cycles of his son, P.W. 1. In any event, on the evidence, the authorities below have found as a fact that the requirement of the landlord was *bona fide* and no material has been placed before this Court to show that conclusion based on the appreciation of evidence is in any manner erroneous. No other point was urged. Consequently, the order of eviction passed by the authorities below is upheld and the Civil Revision Petition is dismissed with costs.

R.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *S.Nainar Sundaram, J.*

*Appeal Against Order No.622 of 1984.
1st December, 1984.

D.Rajaiah *Appellant**

v.

Dhanapal and another *Respondents.*

(A) Hindu Minority and Guardianship Act (XXXII OF 1956), section 6 - Scope and applicability - Minor girls living with and being looked after by their maternal grandfather after demise of their mother - Father re-claiming custody of minors - Petition by maternal grandfather for continuance of custody with him - Factors to be considered - Father's right for guardianship and custody upheld.

(B) Guardians and Wards Act (VIII OF 1890), section 17 - Guardianship and custody over minor children - Welfare of minor to be the paramount consideration - Wishes and preference of minors, not conclusive.

Held:- The rule of Hindu law is that no one other than the father and failing him, the mother has an absolute right to have the guardianship over and custody of an unmarried Hindu minor girl. The Hindu Law recognises primarily the father as the legal guardian and custodian of his unmarried minor daughter when he is alive. Failing the father only the mother comes into the picture and she could assume such guardianship and custody. But an unmarried Hindu minor girl if she has not completed the age of 5 years, shall ordinarily be in the custody of the mother. Furthermore, the minors in the instant case had passed the age of 5. The first minor had completed the age of 12 and was running the 13th year and the second minor had completed the age of 11 and was running the 12th year. Section 6 of the Act 32 of 1956 does not make any substantial alteration in the law on the subject and gives legislative sanction to the principle well established already. As such, the father could legitimately claim the right to have the guardianship over and custody of his unmarried minor girls. In this context, section 19 of Act 8 of 1890 can also be adverted to, when it countenances, that if the father of the minor is alive, no other guardian can be appointed, unless, in the opinion of the Court, the father is not fit for appointment. The father as natural guardian is primarily entitled to the custody of his minor children unless there are overwhelming circumstances to the contrary. It is true that there is an appreciable difference between custody and guardianship; guardianship is a more comprehensive and a more valuable right than more custody. The sole consideration both in the case of guardianship and custody of the minor should be the welfare of the minor. The court is bound to take into consideration all the facts and circumstances of the case bearing in mind that the pivotal factor is the benefit and well-being of the minor. That the dominant factor for consideration of the Court is the welfare of the child, has found statutory footing both in section 17(1) of Act 8 of 1890 and section 13 of Act 32 of 1956. Both the provisions emphasise that the powers of the court are to be exercised for the welfare of the minor, which should be the paramount consideration. In view of the rule of Hindu law recognising the father to be the guardian and custodian of his unmarried minor daughters, the maternal grandfather cannot straightway insist that he should be declared or appointed as the guardian and custodian of such minors. It is for the maternal grandfather, who wants to maintain a contrary position, to demonstrate that there are peculiar and strong circumstances which warrant deprivation of such a parental right of the father. *[Para.3]*

The father has not in the instant case disqualified himself from being the natural guardian of his two minor children. He has not ceased to be a Hindu and he has not completely and finally renounced the world by becom.

a hermit or an ascetic so as to attract the proviso to section 6 of Act 32 of 1956. *[Para.4]*

Though the Court may ascertain the wishes of the minor, such wishes are not controlling on the court and the court has to assess the entire facts and circumstances of the case, and in appropriate cases, can even disregard its wishes and preferences. *[Para.8]*

G.Ramaswami, for Appellant.

T.Martin, for Respondent.

The Court delivered the following

JUDGMENT:- This Civil Miscellaneous Appeal concerns the guardianship and custody of two Hindu Minor Girls. The first minor girl named Meena alias Arthi was born on 13.5.1972. The second minor girl named Priya was born on 13.9.1973. They have lost their mother. The mother is stated to have died on 10.8.1982. Their father is alive and he is the first respondent in this appeal. The appellant is their maternal grandfather. The facts placed in the case have disclosed that the marriage between the parents of the minor children took place on 26.5.1969. The father is an Engineer and he is a M.Tech., and his profession took him to Bhopal, Delhi and Tiruchirapalli. During these years, his wife, the mother of the minor girls, was alive. His employment as such was with Bharat Heavy Electricals Ltd., (BHEL) and he was so employed last at Tiruchirapalli. The mother of the minor children seemed to have fallen sick and she had come to her parents' house at Madurai for treatment. The two minor children seemed to have been brought to Madurai in May, 1982, since their mother was taking treatment there and they were joined in a school at Madurai. Until the death of the mother, no problem seemed to have cropped up. But the demise of the mother seemed to have brought about problems over the guardianship and custody of the two minor children. The father is stated to have left his assignment with BHEL with the intention to start an industry of his own and it is stated that he borrowed money from the maternal grandfather, namely, his father-in-law. The father also was indicating his anxiety to raise a loan over the jewels of the mother, namely, his late wife, for this commitment. It is admitted that the said jewels are in the custody of the maternal grandfather. The father also began to re-claim the custody of his two minor children, which he is lawfully entitled to and he had been writing letters with that end in view. But the maternal grandfather seemed and seems to have a different idea and he wants to have the custody of the two minor children with him. The maternal grandfather preferred O.P.No.98 of 1983 before the District Judge, Madurai South, to declare or in the alternative to appoint himself as the guardian for the two minor children and for continuing their custody with him. The father of the two minor children contested the original petition and the Learned District Judge did not countenance the case of the maternal grandfather and dismissed the petition, and the maternal grandfather had preferred this Civil Miscellaneous Appeal against the orders of the learned District Judge.

2. Mr.G.Ramaswami, learned counsel appearing for the maternal grandfather, the appellant in this appeal, would draw a chart of comparison to impress upon this Court that though the father is the natural guardian of his two minor children, yet on the facts and circumstances of the case, this Court should go by the principle of the paramount interest of the minors and if that principle is kept in mind, the Court should only countenance the case of the maternal grandfather for guardianship and custody. Learned counsel expressed anxiety of his client that if not guardianship, atleast the custody of the minor children should be left with the maternal grandfather. As points speaking in favour of retaining the guardianship and custody of the minor children with the maternal grandfather, the following factors were delineated by the learned counsel: (1) The maternal grandfather is aged 60 and the maternal

grandmother is aged 50 years; (2) The financial position of the maternal grandfather is sound; (3) Ever since May, 1982, the minor children are with the maternal grandparents. The minor children are studying in a good school at Madurai, and it is not worthwhile to disturb their education by taking them away from the custody of the maternal grandparents at Madurai. (4) The jewels of the deceased mother are with the grandparents and they shall be given to the minor children at the appropriate time of their marriage; and (5) the children have been with the maternal grandparents sufficiently long and they are being tended to by the maternal grandparents with love and affection and if they should be snatched away from the said atmosphere, it will bring about a trauma in the minds of the minor children. In contrast, learned counsel for the maternal grandfather would also stress the following factors as speaking against leaving the guardianship and custody of the minor children with the father; (1) The financial position of the father is not good and he had been borrowing loans from the maternal grandfather and was not averse to pledge the jewels of the mother, namely, his late wife. He started his business venture only recently and cannot be stated to be in a stabilised financial position; (2) The father is a widower and he lives only with his own father (paternal grandfather of the minor children), who is also a widower and the age of the paternal grandfather is 70; (3) There is no female member in the household of the father and it is claimed that an aunt of the father, who is stated to be aged 50 and who is living away from her husband, is living with the father of the minor children. There is no guarantee that the said aunt will continue to be in the household of the father and may not go away to join her husband. In the said circumstances, it is not safe to entrust the two minor children under the impression that a reliable lady would be in the household to take care of the minor children, who are girls; (4) The minor children are not willing to go and live with their father and any compulsion over them to do so will bring about a trauma; and (5) The father is a temparamental man and the evidence placed in the case has disclosed that he used to beat his children.

3. Before I approach the question of facts, I would like to delineate and keep in mind the provisions of law, which should form guidelines in matters like this. The two minor children being Hindu girls, with regard to natural guardianship as such, the provisions of the Hindu Minority and Guardianship Act, 1956 (No.32 of 1956) hereinafter, if occasion comes, referred to as Act 32 of 1956, shall first speak. Section 6 of Act 32 of 1956 says that in the case of an unmarried Hindu minor girl, the father, and after him, the mother shall be the natural guardian. The mother had gone out of the picture by her demise. The father as such does not suffer any disqualification set forth in the proviso to section 6 of Act 32 of 1956. Section 13 of Act 32 of 1956 reads as follows;

> 12(1) "In the appointment or declaration of any person as guardian of a Hindu minor by a Court, the welfare of the minor shall be the paramount consideration.
>
> (2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the Court is of opinion that his or her guardianship will not be for the welfare of the minor."

Section 2 of Act 32 of 1956 says that the provisions of the Act shall be in addition to, and not, save as hereinafter expressly provided in derogation of, the Guardians and Wards Act, 1890 (8 of 1890), hereinafter referred to as Act 8 of 1890. Section 17 of Act 8 of 1890 reads as follows:

> 17. Matters to be considered by the Court in appointing guardian.-(1) In appointing or declaring the guardian of a minor, the Court shall, subject

to the provisions of this section, be guided by what consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor and his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

(4) Omitted by Act III of 1951.

(5) The Court shall not appoint or declare any person to be a guardian against his will."

The rule of Hindu law is that no one other than the father and failing him the mother has an absolute right to have the guardianship over and custody of an unmarried Hindu minor girl. The Hindu Law recognises primarily the father as the legal guardian and custodian of his unmarried minor daughter when he is alive. Failing the father only the mother comes into the picture and she could assume such guardianship and custody only in such a contingency. But an unmarried Hindu minor girl if she has not completed the age of 5 years, shall ordinarily be in the custody of the mother. As stated above, the mother is not in the picture at all. Furthermore, the minors have passed the age of 5. The first minor has completed the age of 12 and is running the 13th year and the second minor has completed the age of 11 and is running the 12th year. Section 6 of Act 32 of 1956 does not make any such substantial alteration in the law on the subject and gives legislative sanction to the principle well established already. As such, the father could legitimately claim the right to have the guardianship over and custody of his unmarried minor girls. In this context, section 19 of Act 8 of 1890 can also be adverted to, when it countenances, that if the father of the minor is alive, no other guardian can be appointed, unless, in the opinion of the court, the father is not fit for appointment. The father as natural guardian is primarily entitled to the custody of his minor children unless there are overwhelming circumstances to the contrary. It is true that there is an appreciable difference between custody and guardianship, for guardianship is a more comprehensive and a more valuable right than more custody. The sole consideration both in the case of guardianship and custody of the minor should be the welfare of the minor. The Court is bound to take into consideration all the facts and circumstances of the case; bearing in mind that the pivotal factor is the benefit and well-being of the minor. That the dominant factor for consideration of the Court is the welfare of the child, has found a statutory footing both in section 17(1) of Act 8 of 1890 and section 13 of Act 32 of 1956. Both the provisions emphasise that the powers of the court are to be exercised for the welfare of the minor, which should be the paramount consideration. The rule of Hindu law recognising the father to be the guardian and custodian of his unmarried minor daughters, the maternal grandfather cannot straightway insist that he should be declared or appointed as the guardian and custodian of such minors. The father being primarly entitled to the guardianship over and custody of his unmarried minor daughters, it is for the maternal grandfather, who wants to maintain a contrary position, to demonstrate that there are peculiar and strong circumstances which warrant deprivation of such a parental right of the father. The father can be deprived of such rights only if the facts and circumstances of the case warrant it. Keeping in mind the above salient principles of law, this court has to examine the facts of the case to find out as to

whether strong and convincing circumstances have been made out against the father to take away from him the guardianship and the custody annexed to it of his unmarried minor daughters or to deny him the custody of his unmarried minor daughters, maintaining guardianship with him. I am visualising the latter contingency because in the course of arguments advanced on behalf of the maternal grandfather, it was stated that though the guardianship of the father need not be disturbed, yet the custody of the two minor children should be permitted to be with the maternal grandfather.

4. The father has not disqualified himself from being the natural guardian of his two minor children. He has not ceased to be a Hindu and he has not completely and finally renounced the world by becoming a hermit or an asetic so as to attract the proviso to section 6 of Act 32 of 1956. Until May, 1982, the father, mother and the two minor children lived together in the place where the father was working. Of course, there were periodical visits to the place of the parents of the mother. The mother died on 10.8.1982. She had come earlier to her parents 'house for treatment. The two minor children were also brought to Madurai and they were joined in a school there. The father seemed to have planned to start an industry of his own and he had borrowed loans from his father-in-law, the maternal grandfather of the two minor children. He had requested for further loans and he also indicated an idea that if the loan was not forthcoming from his father-in-law, he had to think about the pledging of the jewels of his late wife, the mother of the two minor children. This is evident from his letter, dated 7.3.1983 addressed to his brother-in-law (brother of his late wife), marked as Ex.A.13. In this letter, he had also requested his brother-in-law to bring the two minor children to Vellore from where he has written the letter. Further, he has indicated a proposed trip to Colombo along with his brother-in-law and his two minor children. Ex.A.14 is another letter written by the father on 6.5.1983 to his brother-in-law. Apart from referring to the need to raise a loan over the jewels of his late wife, the father has requested his brother-in-law to bring the two minor children to him. He has stated that he cannot live without his two minor children. He has requested his brother-in-law to advise the two minor children that they should live only with the father. This part of the letter strikes a plaintive note. In Ex.A.14, the father states that he has no idea as to the details of the jewels of his late wife, and he sets out the compelling circumstances for raising a loan over the jewels. On 16.5.1983, the father has written a letter as per Ex.A.13 both to his children and to his brother-in-law. In this letter, the father has willingly accepted the proposal that the jewels of the mother, his late wife, should be kept in safe custody until the two minor children come up of marriageable age. There is an indication that his father-in-law was inclined to advance moneys. Obviously, the father was not keen to fritter away the jewels, but was only pointing out the need to raise loans over the jewels for want of any other alternative. The loan was admittedly required for his business venture. In this letter the father pleads with his first minor child to come and join him, allowing the second minor child to study at Madurai for one year. This letter strikes a very affectionate and a pathetic note towards the minor children. The father pleads that his minor child should talk to him over the phone. He has also requested his brother-in-law to bring the minor children to Vellore for a brief stay to that they can all go to Tirupati and Samayapuram; the letter place, it is stated that the mother while she was alive, wanted to visit. On 5.9.1983 as per Ex.A.9 we find the father has written a letter to his first minor child. He expresses regret for having beaten the child and there is a helple[illegible] and a heart-rending plea that without his children, who could be with him. This letter again is a pathetic reading. This letter indicates that the father

has enclosed a self-addressed inland letter requesting the first minor child to write a letter to him. This letter dated 5.9.1983, Ex.A.9 is stated to have been addressed to the first minor child to her school address. The father has warned the child not to disclose the receipt of this letter to the maternal grandfather. This certainly brings an impression to the mind of this court that the maternal grandparents were wielding an unnatural influence over the minor children, alienating their natural feelings towards the father and frowning upon even communication between the father and his children. The inland letter which came to be written by the first minor child has been marked as Ex.B.1. It bears the postal seal dated 14.9.1983 of Vellore. This imputation by the maternal grandfather is that this was written at the instance and with the help of the second respondent, who is the headmistress of the concerned school at Madurai where the children were studying. But there is no dispute that this letter was written by the first of the two minor children. A reading of this letter conjointly with Ex.A.9 certainly discloses that not only the father, but also the minor children were entertaining an apprehention and fear that the maternal grandparents would not relish and were against the natural rapport between the father and his children. In this letter Ex.B.1 it is stated that nothing will be mentioned to the maternal grandparents about the letters. The first minor child has also stated that she and her sister will come and join the father next year and they will come to the father for holidays. It is further stated that the two minor children have no grievance against the father. This letter strikes a very affectionate note. Then comes Ex.A.11 dated 20.9.1983 written by the maternal grandfather. This letter strikes a very unnatural note. The maternal grandfather has taken exception to the father writing a letter to his own minor children. It is expressed the letter was not written voluntarily, and the maternal grandfather directs the father that the said letter should be either torn off or else returned to him. The father writes Ex.A.10 on 30.9.1983 in reply to Ex.A.11. Apparently he was left aghast and chagrined by the attitude of the maternal grandfather, namely, his own father-in-law. The direction to tear off the letter or to return the letter seemed to have pained him very much and pratically he characterised the maternal grandfather as a shameless person. The father in this letter pleads for the return of his children to him.

5. These are the documents which throw light on the attitude of the parties. On an assessment of these materials, I am not able to spell out that the father has in any manner lost his filial affection towards his two minor children. The fact remains that he has not re-married. The borrowing of loans and the earlier indication to raise loan over the jewels of his late wife, the mother of the two minor children, were contingencies which he could not avoid because the father obviously wanted to start an industry of his own resigning the job which he held. There is nothing unnatural for a yound man, fully qualified in seeking other affluent financial ventures; and for the purpose of raising loans, if at some point of time, the father had an idea of raising loans over the jewels of his late wife, the mother of the two minor children, obviously with the intention to redeem them subsequently, the Court cannot characterise the father either as a spendthrift and who will fritter away the jewels, or one, who has no interest at all with regard to the safeguard and security of the jewels for the benefit of his minor children. I find that in Ex.A.15, he has accepted the proposal to keep the jewels in safe deposit for the benefit of his minor children, since finance through other source, namely, his father-in-law was expected.

6. One other factor that was pressed forth as speaking against the father is the beating which he is stated to have given to the first of his minor children. In the original Petition, in paragraph 15, it is stated that the

father beat the first child when she refused to accompany him to Ranipet, and after the ceremonies relating to the first anniversary of the demise of the mother were over, in August, 1983. This Court should not lose sight of the fact that the father had been pressing for the company of his minor children and had been pleading for their joining him, as we could see from Ex.A.13, A.14 and A.15. If the minor child, without due regard to those feelings of the father, declined to accompany the father as requested by him, naturally, the father would have lost his temper, but that was only momentary and he has expressed regret for the same in Ex.A.9. This instance cannot be magnified. Certainly the evidence has not disclosed that the father was and is a cruel man. As rightly pointed out by the learned District Judge beatings sometimes are resorted to correct erring children, and it is not possible to characterise occasional beating by a parent of a child as tantamounting to an act of cruelty so as to disentitle the parent from having the guardianship or the custody of his minor child. It is only in this context, Mr.T.Martin, learned counsel for the father, drew my attention to the following aspects in the evidence of the maternal grandfather examined as P.W.1. P.W.1 has admitted that the father of the two minor children was taking care properly and in the right manner of the two minor children and their mother. P.W.1 has also admitted that the father will look after the two minor children as he (P.W.1) himself proposed to do. Equally so, P.W.1 has admitted that the children came to be joined in a school at Madurai so as not to affect their education. We must remember at that time the mother was alive and she was taking treatment at Madurai in her parents' house. Significantly, P.W.1 also has admitted that if the father is prepared to look after the children and bring them up comfortably, he has no objection for the same. My attention has not been drawn to any clinching factors, which would demonstrate that the father is in any way disqualified from having the guardianship and custody of the two minor children and that it is not desirable to continue the guardianship and custody of the two minor children with him. If this is so, the father alone would be entitled to have the guardianship over and custody of his two minor children, unless any other relevant factors indicated a contrary position.

7. Learned counsel for the maternal grandfather would urge that the fact that the two minor children have remained in the maternal grandparents' house from May, 1982 should not be lost sight of, and if at this juncture they are to be snatched away from that atmosphere, which would be against their will, it will bring about a trauma in their mind and will not behove well for the interests of the minors. It is true that the paramount consideration that should weigh with the Court is the welfare of the minor children. From the bare fact, for two years and more in the past, the two minor children happened to be in the custody of the maternal grandparents it is not possible to say that such a custody should be continued in preference to the legitimate claims of the father, on the ground of paramount interest of the two minor children. The financial affluence of the maternal grandparents should not be the sole criterion. It is not claimed that the father is a man of no means and he could not maintain and bring up his two minor children comfortably and according to his status. On the other hand, as adverted to earlier, the evidence of the maternal grandfather examined as P.W.1 points out a different position, and makes out that the father will cater to all the comforts of his minor children and bring them up as good as the grandparents. The coming over of the mother of the two minors for treatment at Madurai, her demise at Madurai and the children coming along with her earlier to that and staying with the maternal grandparents could only be treated as temporary phases, and they cannot govern as paramount factors with regard to the welfare of the minors. After all, they are the

children of the father and when the Court has found that the father has not suffered any disqualification for being a guardian and custodian of his two minor children and no other has been brought to the notice of the Court that it will not be desirable to leave the guardianship and custody of the two minor children with the father, the situation that the maternal grand-parents would look after the children in better and affluent circumstances is not a relevant factor that should weigh with the Court to deny the legitimate parental right of the father to the guardianship and custody over his two minor children. A proposition that wherever affluence and luxury are prevailing that should be the proper atmosphere for minor children to be brought up, denying the legitimate rights of the parents and lawful guardians, would be a dangerous one. Primarily the children should be in the custody of their parents, who are their lawful guardians. They cannot expect a status and upbringing *de hors* the status of the parents while they are being brought up by them. No one else could be allowed to snatch away the children from the parental household on the ground that they could afford luxury and affluence to the children. The welfare of the minor children is not to be measured only in terms of money and physical comforts. The word "welfare" must be taken in its widest sense. The moral and ethical welfare of the child must also weigh with the Court as well as its physical well-being. The two minor children are girls. Shortly they will come of age and they have to be married. In our Indian Society and in particular Hindu Society, anybody seeking matrimonial alliance will certainly give due importance to the girls living with the parent and a situation, where a girl is living away from her parent will be looked at askance, and may draw asperative remarks too.

8. Since a complaint was made that the learned District Judge did not resort to the process of ascertaining the wishes of the two minor children before he passed the order, subjectmatter of challenge in this civil miscellaneous appeal, I completed that process also before this Court. The two minor children were produced before me on 13.12.1984 at my Chambers and they were questioned in the presence of both the counsel. First I questioned the first minor girl by name Meena alias Aarthi. She categorically stated that while the mother was alive, they were all living happily. She has also answered that the father has not neglected them. She understood the question that for a child the father is the most needed person and she answered the question in the affirmative. However, for a question as to whether she would like to go and stay with her father, she gave the answer in negative. When I asked her why she says so, her answer was that even for a small thing, her father scolds and beats them. She has also understood the position that when she grown up, people will ask as to what happened to her father. The second minor girl was also questioned by me and she also says that she would not like to go and stay with her father because he will beat her and her sister. When I asked as to whether the father was beating them always, she said 'No'. She also understands that when she grows up, the world will say that she is living away from her father. I watched the demeanour of the two minor children intently, and I clearly gathered the impression that having been under the influence of their maternal grand-parents, their answer with reference to their declining to live with the father appeared to be tutored one, apart from being an unnatural one. In my view, this is only a temporary phase and should not be given undue importance. Though the court may ascertain the wishes of the minor, such wishes are not controlling on the Court, and this Court has to assess the entire facts and circumstances of the case, and in appropriate cases, can even disregard the wishes and preference expressed by the minors, especially when the Court gathers an impression as in the present case that the minors have not given the answers on the question of their

wish voluntarily, but under influence and tutoring. In the petition only one instance of beating is referred to, but the version of the minor children that the father was beating always brings ample suspicion to my mind that the children have been tutored. I have this impression gathered on examination of the two minor children.

9. The father has actually started the industry at Ranipet and this has been admitted even by the maternal grandfather, P.W.1. The father examined as P.W.1 has spoken to about the details of his industry and he says that the investment would amount to rupees twelve lakhs and the shares of the other partners would amount to only rupees two and half lakhs and that he is getting an income of Rs.4,000/- to Rs.5,000/- per mensem. Hence, even from the point of view of material comforts of the two minor children, they are not likely to suffer for want of the requisite finance and wherewithal on the side of the father. The maternal grandparents are also equally aged and it is not possible to visualise a situation that the physical comforts of the two minor children will be properly looked after by them, if we take note of their falling age and the infirmities, that are usually attendant thereto. In the household of the father, who is only aged about 40 or so, it is found that he has got an aunt of his, besides his own father, namely, the paternal grandfather of the two minor children. As on date the aunt is there. On the simple ground that there is no lady in the house, it is possible to deny the custody of the two minor girls to the father. All said, on the facts of the case in my view, they must have their abode only in the father's household. Mr.T.Martin, learned Counsel for the father, was anxious to state that the maternal grandfather could not be stated to be interested in the welfare of the two minor children. He draws my attention to the partnership which the maternal grandfather entered into with the mother of the two minor children when she was alive, under Ex.A.12, dated 18.8.1969, wherein it is found that her share of investment was Rs.25,000/- In evidence the maternal grandfather as P.W.1 would claim that amount as his; and further on the death of the mother, he has not cared to take the two minor children to the benefits of the partnership. On the other hand, he has taken his son as a partner. This factor cannot be eschewed me totally irrelevant on the question of interest and welfare of the two minor children.

10. My attention was drawn to certain pronouncements including one of the highest Court in the land to impress upon me that the paramount interest of the minor children should weigh with the Court and in appropriate circumstances, the custody of the minor child could be denied to the father. There is no need to refer to them because the said principle is a well-accepted one. I have already delineated the principles and I have not lost sight of them while dealing with the facts of the present case. The father could lose his legitimate parental right of guardianship over and custody of his minor children if the facts and circumstances justify them. But my analysis and discussion of the facts and circumstances of the present case do not bring conviction to my mind that there exists any clinching factor, which could turn and speak against the father to deny his parental right for guardianship and custody over his two minor children.

11. For the reasons expressed above, I am not able to persuade myself to interfere with the findings rendered and the ultimate conclusion reached by the learned District Judge and this obliges me to dismiss the civil miscellaneous appeal and accordingly the same is dismissed with costs.

R.S. ---- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Nainar Sundaram, J.*

*C.R.P.No.4069/84. 13*th December*, 1984.

Messrs.Thilagaraj Match Works, through its partner S.Chidambaram *Petitioner**

v.

C.Sundaresan *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (18 of 1960), as amended by Act (XXIII of 1973), sections 10(3)(c) (iii) and 10(3)(e) - Petition for eviction - Requirement for the purpose of landlord's paper business - Requirement ought to be bona fide and not mere desire of the landlord - Element of need necessary.

Bona fide is primarily a subjective element. The very ingredient of section 10(3)(e) of the Act requires that the question of *bona fide* has got to be tested and it has got a due place while adjudicating a petition for eviction by the landlord under the concerned provisions. It is not the impulse or desire of the landlord, but there must be an element of need for the landlord before it could be stated that he requires the premises for his own occupation. After all *bona fide* will have to be proved in an ordinary manner like any other fact in issue, and the entire gamut of facts and circumstances has to be adverted to on this question.

[Para.5]

Case referred to:-

Satwant Kaur v. Dhumd Singh, (1983)3 S.C.C.638= A.I.R.1983 S.C.623.

M.Srinivasan, for Petitioner.

N.Sivamani, for Respondent.

The Court made the following

ORDER:- The tenant within the meaning of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, hereinafter referred to as the Act, is the petitioner in this revision. The landlord within the meaning of the Act is the respondent herein. The landlord sought the eviction of the tenant under section 10(3)(a)(iii) of the Act on the ground that he requires the promises in question for the purpose of his paper business. There is no dispute that the tenant himself is carrying on a match factory industry in the premises in question. The parties placed their evidence before the Controller and the Controller on assessment of the same did not countenance the case of the landlord and dismissed the petition for eviction. The landlord appealed and the Appellate Authority came to a different conclusion and ordered eviction of the tenant. This revision is directed against the orders of the Appellate Authority.

2. Considering the submissions made by Mr.M.Srinivasan, learned Counsel appearing for the tenant/petitioner herein, I do not feel obliged to dwell in detail over the merits of the same, since I am impressed that the relevant factors which ought to have weighed with the Appellate Authority for deciding the question in issue have not been adverted to and appreciated by him and I am inclined to remit the matter back to the Appellate Authority for fresh consideration. It is true that the Appellate Authority set forth in his order the ingredients of section 10(3)(iii) of the Act to be satisfied by the landlord before he could have the benefit of the order of eviction under the provision. But as rightly contended by the learned Counsel for the tenant, there has not been an advertence to the relevant aspects, which stand exposed in the case, for the purpose of finding out as to whether the landlord has made out a case of *bona fide* requirement, but on the other hand, the Appellate Authority has approached this in a half-hearted manner and has rendered a decision summarily. I am only delineating certain factors which were brought to my notice and I am not expressing any opinion over

them one way or other, since they require advertence to and adjudication upon by the Appellate Authority. There was a petition for eviction filed by the landlord in 1978. He succeeded before the Controller and as per certified copy produced by Mr.N.Sivamani, learned Counsel for the landlord, the proceedings before the Controller got terminated on 6-8-1979. The tenant seems to have filed an appeal and in the appeal, the tenant succeeded and the order of the Appellate Authority is dated 25-4-1980. The documents produced in the present case by the landlord to demonstrate that he is carrying on business relates only to the period commencing after the order was passed by the Appellate Authority in the earlier proceedings. From this it is urged that there was nothing but a dishonest intention on the part of the landlord to have the eviction of the tenant at any cost and hence the documents were obviously brought about to make out a case as if the landlord is carrying on business elsewhere. It was brought out in evidence that the landlord presented a petition before the Collector to cancel the licence of the tenant and he could not succeed before the Collector. The matter has come to this Court by way of writ petition at the instance of the tenant. Equally so, it was brought out in evidence that there were proceedings before the civil Court wherein the landlord was anxious to obtain an order of injunction against the tenant and conversely the tenant was anxious to obtain an order of injunction against the landlord.

3. From these features, learned Counsel for the tenant submits that dishonest intention ought to have been spelt out. It is not possible to state that these features are wholly irrelevant as the Appellate Authority would cursorily opina; without adverting to them in detail.

4. *Bona fide* is primarily a subjective element. There must exist essential ingredients to establish that the landlord has an honest need to occupy the premises in question. More than the impulse or the desire of the landlord, there must be force of personal circumstances to make out the landlord's honest need to occupy the premises in question. All the relevant materials have got to be looked into and as stated above, *bona fide* is very much allied and concerns with a subjective element, and has got to be spelt out by the entirety of facts and circumstances in each case. Next it is contended by the learned Counsel for the tenant that the premises in question is of a very large area, and considering the nature of the business stated to be carried on by the landlord, his claim for such a large area could not be genuine. The landlord himself has admitted that the main building itself measures 1500 square feet and apart from that, there are other rooms. Comparatively it was also brought in evidence that the landlord himself is occupying a portion of the premises belonging to his grandmother, which he says is only under a rental arrangement and when he was asked about the space occupied by him, obviously to bring out the comparison, he stated that he cannot give the measurements. It is only in this context, Mr.M.Srinivasan, learned Counsel for the tenant, brings to my notice a decision reported in *SATWANT KAUR v. DHUND SINGH*, (1983)3 S.C.C.638= A.I.R.1983 S.C.623 where while considering the question under Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950) regarding the *bona fide* need of the landlord, the Supreme Court took note of the nature of the business of the landlord, to find out as to whether such business requirement should necessarily be satisfied by requisitioning the entirety of premises in question in the occupation of the tenant. May be the provisions in the Rajasthan Act, permitted such partial eviction. I should not be understood to have countenanced a rule that under the Tamil Nadu Act, partial eviction could be accorded, though eviction from the premises as a whole is asked for. No contingency has arisen before me to advert to such a question. I am referring to this aspect only to say that it may be relevant on the question of *bona fides*, and

nothing more.

5. In the present case, the Appellate Authority has not adverted to these features at all and in one place he observes that the *bona fide* of the claim of the landlord is extraneous and it should not be tested too severely. This exposes his wrong approach to the question of *bona fide* which is a relevant one. The very ingredient of section 10(3)(e) of the Act requires that the question of *bona fide* has got to be tested and it has got a due place while adjudicating a petition for eviction by the landlord under the concerned provisions. It is not the desire of the landlord, but there must be an element of need for the landlord before it could be stated that he requires the premises for his own occupation. The features referred to above, cannot be eschewed as irrelevant, for after all *bona fide* will have to be proved in an ordinary manner like any other fact in issue, and the entire gamut of facts and circumstances has to be adverted to on this question. As already stated, I am not expressing any opinion over these features on merits, and it is for the Appellate Authority to advert to them and adjudicate upon the question afresh one way or the other. The discussions above oblige me to interfere in revision and accordingly the revision is allowed and the matter stands remitted to the Appellate Authority for him to consider it afresh taking note of all the relevant features and factors of the case on the question of *bona fides*, and pass appropriate orders. Both the counsel represent that for the purpose of comprehensive adjudication of the matter, further evidence has to be adduced. I take note of the request of both the counsel and I direct that the Appellate Authority will permit the parties to place further evidence and he will decide the matter afresh after such evidence is placed, the Appellate Authority will do well to dispose of the matter expeditiously and in any event within a period of three months from the date of receipt of the copy of this order.

R.S. ---- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *S.Swamikkannu, J.*

*C.R.P.No.4534 of 1982. *27th April,* 1984.

M/s. Jethmal Sukanraj, reptd. by Partner Sukanraj *Petitioner**

v.

M/s. Surendra and Co., by its Sole Proprietor Kishore Kumar *Respondent.*

(A) Civil Procedure Code (V OF 1908), section 35 and Civil Rules of Practice, Rules 95 and 96 - Appellate Court awarding costs of the proceedings in the trial Court - Appellant filing bill of costs and the certificate of fees in the appellate Court for the trial Court proceedings - Bill of costs not filed in the trial Court within time - Application for condoning the delay in filing the same - To be filed only in the trial Court.

(B) Practice - Filing of Bill of costs of the trial Court to be made only in the trial Court.

Held:- The contention that the sucessful party alone is entitled to recover costs and need file the bill of costs within time, and not the other party who is not to receive the costs but only to pay costs. Admittedly, in the instant case, the bill of costs relating to costs incurred by the defendant in the trial Court had not been filed within the stipulated time after the judgment of the trial Court. Therefore, the lower Court is correct in having held that the revision petitioner herein had not filed his bill of costs so far as it relates to costs incurred in the trial Court within the time. *[Para.11]*

When the bill of costs is not filed in a court within the specified time, it is only to that court, the party which committed default has to apply for condonation of delay in filing the bill of costs including the fee certifi-

cate and pray further for the inclusion of the same and get the decrees of that court amended. *[Para.12]*

The revision petitioner was given liberty to move the trial Court for condonation of delay in filing the bill of costs including the fee certificate. *[Para.12]*

Cases referred to:-

Janaki Ammal v. Narayanaswami Iyer, (1917) 33 M.L.J.300; *P. Venkateswarlu v. Motor and General Traders*, (1976)1 S.C.J.393= (1976)1 An.W.R. (S.C.) 35= (1975)1 S.C.C.770= (1975)3 S.C.R.958= A.I.R.1975 S.C.1409; *Santosh Kumar v. Bhai Mool Singh*, (1958)1 M.L.J. (S.C.) 159= (1958)1 An.W.R. (S.C.) 159= 1958 S.C.J.434= (1958) S.C.R.1211= A.I.R.1958 S.C.321; *Sangram v. Election Tribunal*, (1955)2 M.L.J. (S.C.) 13= (1955) S.C.J. 431= (1955)2 S.C.R.1= A.I.R.1955 S.C.425.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the City Civil Court (I Addl.Judge), Madras, dated 14th September, 1984 and made in C.M.P.No. 72/81 in A.S.No.151/78.

Himmatmal Mardia, for Petitioner.

R.S.Venkarachari, for Respondent.

The Court made the following

ORDER:- The appellant-petitioner in C.M.P.No.72/81 in A.S.No.151 of 1973 on the file of the Court if the learned Additional Judge, City Civil Court at Madras, is the respondent herein. The said C.M.P.No.72/81 was filed by the appellant in A.S.No.151 of 1978 under section 151, C.P.C. praying to amend the decree, dated 1st January, 1980 in A.S.No.151/78 by including the costs of trial Court as per the judgment and condoning the delay in filing the fee certificate in O.S.No.9379/74.

2. The affidavit of the partner of the appellant-firm in C.M.P.No.72 of 1981 is that the appellant became entitled to costs only on the award thereof by the lower appellate Court in allowing the appeal and dismissing the suit with costs and therefore, the counsel filed his fee certificate after the appellate judgment was pronounced and that the decree has been drafted without including the costs in the trial court. It is alleged that the fee certificate has been filed within the time stipulated after the appellate judgment was pronounced and hence the costs of the trial Court as certified should be taxed and included in the decree and delay, if any, in filing the fee certificate, should be condoned.

3. The plaintiff opposes the application in his counter-affidavit, it is stated that no bill of costs and fee certificate had been filed in the trial court within the time granted after judgment of the trial court was pronounced and hence, the same should not be included in the decree and that the said costs cannot be now taxed and included when the fee certificate is filed in the lower appellate court. It was further contended before the lower court that the prayer for condonation of the delay must be made by a separate petition and thereafter only, any petition for amendment of the decree as drafted should be filed.

4. The following points were frmaed by the lower Court for determination in C.M.P.No.72/81:-

i. Has the bill of costs so far as it relates to costs incurred in the trial Court been filed in time?

ii. If not, is the delay, to be condoned?

iii. Does the decree as drafted require to be amended and if so, in what manner?

On point No.1, the lower court held that the appellant-petitioner had not filed his bill of costs so far as it relates to costs incurred in the trial Court within time. Under point No.2, the lower court held that there is no ground to condone the delay in the matter of filing the bill of costs so far as the trial court costs are

concerned. Under point No.3, the lower court held that no amendment of the decree as drafted by the appellate court is necessary. The lower court dismissed the petition accordingly. Aggrieved by the above decision of the lower court, the court of the learned First Additional Judge, City Civil Court at Madras, the appellant-petitioner has come forward with this civil revision petition.

5. In the affidavit accompanying the petition it is *inter alia* stated by the partner of the appellant/petitioner that the appeal A.S.No.161/78 was allowed on 4th January, 1980, dismissing the plaintiff's suit with costs, that their advocate filed bill of costs and fee certificate in the above suit and also bill of costs in A.S.No.151/78. It is further stated in the affidavit that the lower court on 4th January, 1980 dismissed the plaintiff's suit with costs and therefore, their advocate had filed fee certificate for the suit and as such, the appellant-petitioner is entitled to the costs of the trial court. It is further stated in the affidavit that the certified copy of the decree was received by the appellant-petitioner on 28th May, 1980 and that he immediately filed a memo on 16th July, 1980 in the office to correct the decree copy by including the costs of the trial Court. The Office had returned the said memo saying that the costs cannot be included in the appellate decree. It is further stated in the affidavit that the learned Counsel for the appellant-petitioner filed the fee certificate within the time after the judgment was delivered in the above appeal and there is no delay in filing the same.

6. In the counter-affidavit filed in C.M.P.No.72/81 it is *inter alia* contended that there cannot be any amemdment of the decree with regard to non-inclusion of costs unless and until the delay in filing the bill of costs in the trial court is first condoned. It is further contonded that in the petition it is not stated as to how many days of delay has to be condoned by the lower court. No copy of the bill of costs is filed along with the present petition. It is contended by Mr.Himmatmal Mardia, the learned Counsel for the petitioner herein that though the bill of costs for the costs incurred in the trial court has to be filed before the trial court within seven days of the judgment of the trial court, it does not mean that the same cannot be filed before the appellate court in respect of the costs incurred in the trial court if the final decree has been passed by the appellate court awarding costs of the trial court, after the appellate court's judgment but within seven days of such appellate court's judgment. In support of this contention the learned counsel for the petitioner herein refers to the decision reported in *JANAKI AMMAL v. NARAYANASWAMI IYER*, (1917) 33 M.L.J.300 for the following proposition:-

> "Where the High Court ordered by its decree each party to bear his own costs but that decree was reversed by the Privy Council which allowed to the appellant before it, his costs incurred in the High Court also, it was held that a fee certificate filed by the pleader for the appellant in the High Court in respect of fees received by him was not out of time because it was not filed within the seven days allowed by the rules."

The decision in *P.VENKATESWARLU v. MOTOR AND GENERAL TRADERS*, (1975)1 S.C.C.770= (1976)1 S.C.J.393= (1976)1 An.W.R. (S.C.) 35= (1975)3 S.C.R.958= A.I.R.1975 S.C.1409 is referred to by the learned counsel for the revision petitioner herein for the proposition that an appeal is by way of a re-hearing and the Court may make such order as the judge of the first instance could have made if the case had been heard by him on the date on which the appeal was heard. The decision in *SANTOSH KUMAR v. BHAI MOOL SINGH*, (1958)1 M.L.J. (S.C.) 159= A.I.R.1958 S.C.321=(1958)S.C.J.434= (1958) S.C.R.1211= (1958)1 An.W.R. (S.C.) 159 is relied on by the learned counsel for the following proposition:-

> "Now what we are examining here are laws of procedure. The spirit in which

questions about procedure are to be approached and the manner in which rules relating to them are to be interpreted are laid down in *SANGRAM v. ELECTION TRIBUNAL KOTAH, BHIREY LAL BAGA*, (1955)2 M.L.J.(S.C) 13= (1955)S.C.J.431= (1955)2 S.C.R.1= A.I.R.1955 S.C.425.

Now a code of procedure must be regarded as such. It is procedure, something designed to facilitate justice and further its ends; not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of section that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be sued to frustrate it.

Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle. Applied to the present case, these observations mean that though the court is given a discretion it must be exercised along judicial lines and that in turn means, in consonance with the principles of natural justice that form the foundation of our laws. Those principles, so far as they touch the present matter, are well known and have been laid down and followed in numerous cases."

7. Mr.R.S.Venkatachari, *amicus curiae* contends that the rule 96 of the Civil Rules of Practice deals with statement of costs and that as per the provisions of the said rule, each party shall, within seven days from the date of judgment or order or such further period as may be allowed by the court, bring into Court the certificate mentioned in the form contained in Appendix D, Forms Nos.1 and 2, and Appendix G, Form No.9, Civil Procedure Code, 1908 and signed by him or his pleader, if any, of the costs and expenses incurred by him and may include therein the cost of preparation or process, the cost of production of any public record, of making and getting copies of pleading, application or affidavits which by the rules are required to be served on the opposite party, of such encumbrances and of obtaining the encumbrance certificates whenever such certificates are required to be produced and of nay adjournment or interlocutory application allowed to him and shall give credit for any costs allowed to his opponent and shall state the total amount claimed by him. The said statements shall be checked by the officer of the court, who shall note thereon the sums, if any, allowed and the total amount allowed by him and shall sign the same. If any party makes default in filing the said statement, the officer of the court shall prepare and sign a statement of the amounts of institution fee, if any and the pleader's fee as fixed by the judge, allowable to the said party. Every party shall be entitled to inspect and take a copy of the statement.

8. In appeals, the costs or the certified copies of the judgment and the decree of the lower courts filed with the memorandum of appeal in compliance with the rules shall be included in the statement of costs. The statement referred to in paragraph (1) shall be signed by the judge and shall form part of the record of the case; and the total amount of costs allowed to the party to whom costs have been awarded shall be inserted in the decree of order before the same is signed by the Judge.

9. It is contended by Mr.R.S.Venkatachari, the learned *amicus curiae* that the rule 96 is mandatory and that this rule requires that each party, whether they are successful or not must file the bill of costs within seven days from the date of judgment or decree along with the fee certificate. Time-limit has been prescribed and if default is committed in filing the fee certificate or bill of costs, the officer of court can proceed with the preparation of bill of costs and in the absence of the fee certificate filed by the counsel, it will not be included in the decree of the trial court. The question is if fee certificate is not filed before the trial court and therefore not included in the certified copy of the decree of the trial court filed along with the memorandum of appeal, can the appellate court allow the fee certificate which ought to have been filed before the trial court to be included in the statement of costs. It is clear that this will defeat the very purpose of rule 96(2) which states that the statement referred to in para (1) shall be signed by the Judge and shall form part of the record of the case. Therefore, even if the appellate court awards costs of both the courts, the costs of the trial court which can be included in the statement of costs, is only what is shown in the certified copy of the decree of the trial court. The fee certificate must be filed before the trial court and the decree of the trial court must be amended to include the fee paid to the counsel during the stage of trial of the suit and that can be done only by filing a petition to condone the delay in filing the fee certificate. It is further contended that this interpretation and approach to the provision of rule 96 of Civil Rules of Practice is beneficial to both the parties to the litigation and it is also in consonance with principles of natural justice. It is further submitted by Mr. R.S.Venkatachari, learned *amicus curiae* that the party cannot take advantage of his own default and plead that whether he files the fee certificate or not in the trial court, the advocate's fees should be included because the appeal is allowed with costs. It is further contended by Mr.R.S.Venkatachari that if the fee certificate relating to trial court is allowed to be filed straight in the appellate court, the other side would be denied an opportunity of questioning the quantum of the advocate-fee if it exceeds the schedule fees that can be allowed in law.

10. The suit had been decreed with costs in the trial court and the defendant had preferred an appeal. Admittedly, the defendant had not filed his bill of costs before the trial court within the time granted after the judgment was delivered by the trial court. In fact, he had not filed the same at all. Therefore, the decree as drafted by the trial court did not contain the costs incurred by the defendant as taxed by the court. On appeal, the lower appellate court had allowed the appeal with costs and set aside the trial court's judgment and decree and had dismissed the suit with costs. Thereafter, it was contended on behalf of the defendant-revision petitioner herein before the lower court, as contended before this Court, that he had filed into court his bill of costs mentioning therein the costs incurred by the defendant in the appellate court as well as the costs incurred in the trial court. The office of the lower court had in preparing the appellate decree, provided for costs as taxed with reference to the costs incurred in the trial court.

11. As rightly contneded by Mr.R.S.Venkatachari, rule 96 of the Civil Rules of Practice requires all parties to file within 7 days of the date of judgment, a certificate mentioned in rule 95 and also a statement in the form mentioned in the said rule giving details of costs incurred. The rule further provides for taxing of institution fee, if any, and the pleader's fee as fixed by the judgment in case of default in filing the said statement. Therefore, the contention raised on behalf of the revision petitioner herein by Mr.Himmatmal Mardia that it is only

the successful party entitled to recover costs that need file the bill of costs within the time and not the other party who is not to receive the costs but only pay costs does not appear to be correct. Admittedly, in the instant case, the bill of costs relating to costs incurred by the defendant in the trial court had not been filed within the stipulated time after the judgment of the trial court. Therefore, the lower court is correct in having held that the revision petitioner herein had not filed his bill of costs so far as it relates to costs incurred in the trial court within the time.

12. It is relevant to note that when the bill of costs is not filed in a court within the specified time, it is only to that court, the party which committed default has to apply for condonation of delay in filing the bill of costs including the fee certificate and pray further for the inclusion of the same and get the decree of that court amended. Under these circumstances, there is no infirmity in the order under revision. Accordingly, the civil revision petition fails and stands dismissed. However, there will be no order as to costs. The revision petitioner is given liberty to move the trial court for condonation of delay in filing the bill of costs including the fee certificate.

13. Before parting with this case, this Court records its appreciation towards the efficient assistance that had been given by Mr.R.S.Venkatachari as *amicus curiae*.

R.S. ----- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *R.Sengottuvelan, J.*

*I.N.No.28 of 1983 and Application No.31 of 1984. *2nd July*, 1984.

M/s. Ajit India Pvt. Ltd, Petitioning Creditor *Petitioner**

v.

M/s. Raghava and Veera and others *Respondents.*

Presidency Towns Insolvency Act (3 of 1909), sections 9(d)(iii) and 9(g) and 9(2) and 11(b) - Debtor filing application to set aside insolvency notice under section 9(2) alleging that he was not doing business within the jurisdiction of the Court - Question of limitation also raised - Debtor residing outside India - Official Assignee taking possession of the business premises shows that debtor cannot be said to be carrying on business therein - Notice against the insolvent under section 9(2) liable to be set aside.

Held:- From the statement of the Official Assignee, it is seen that he had taken possession of the business premises of the debtor. When the business premises was taken over naturally the business cannot be carried on unless it is shown that the applicants were carrying on business in some other premises. No such evidence is forthcoming in the present application. There is no difficulty in coming to the conclusion that the applicants are not carrying on business after the order of adjudication was passed against them. *[Para.5]*

Considering the entire circumstances it cannot be held that the applicants will be deemed to be carrying on business till the debts are discharged inspite of their earlier adjudication and consequent vesting of the business and the properties in the Official Assignee. The applicants cannot be adjudicated as insolvents under section

9(2) of the Act. Consequently, the insolvency notice has to be set aside and this application has to be allowed.

[Paras.5 and 8]

Cases referred to:-

B.C.Munirathnam Naidu v. M/s. Meena Financiers, (1977)2 M.L.J.399= I.L.R. (1978)1 Mad.169= 90 L.W.539= (1977) T.N.L.J.286= A.I.R.1978 Mad.46; *Gokuldoss v. Dwarkadoss*, (1925) 49 M.L.J.457= I.L.R.48 Mad.795= 22 L.W.411= A.I.R.1925 Mad.1249; *Theophile v. Solicitor General*, (1950)1 All E.R.405.

K.N.Balasubramaniam, for Appellant.

G.Nandalal, for Respondent.

The Court made the following

ORDER:- This is an application by the debtors in the Insolvency Notice No.28 of 1983 to set aside the insolvency Notice.

2. The averments in the affidavit are as follows:- The first debtor is a partnership firm and it ceased to do any business from the year 1977. Two insolvency petitions, viz. I.P.No.129 of 1976 and I.P.No.66 of 1977, were filed to adjudicate the firm as insolvent. The firm has been adjudicated as insolvent along with its two partners, *viz.* second and third debtors in I.P.No.129 of 1976. The order of adjudication was confirmed in the Appeal O.S.A.No.80 of 1977. A further appeal to the Supreme Court in S.L.P.No.2020 of 1978 has been admitted and is pending as a civil appeal in which all further proceedings have been stayed. The act of insolvency alleged in this application is under sections 9(d)(iii) and 9(g) of the Presidency Towns Insolvency Act III of 1909, hereinafter referred to as the Act. After the adjudication by the Insolvency Court, the first debtor/firm has stopped doing business. In order to give a valid insolvency notice, the creditor must prove under section 9(2) of the Act that the debtor/firm was carrying on business either in person or through an Agent within the limits of the original jurisdiction of this court and that such debtor/firm was carrying on business within a year before the presentation of the Insolvency notice. In this case, the notice of insolvency was presented on 22nd August, 1983. For six years prior to the date of notice the firm had not been doing business. The 2nd contention is that the second debtor, viz. Raghava Reddy had left India in 1978 and is now a permanent resident of U.S.A. He has not returned to India so far. Hence, this Court has no jurisdiction under section 11(b) of the Act to adjudicate the second debtor as insolvent. Under the circumstances the respondent is only entitled to prove its claim in the prior insolvency proceedings and is not entitled to a fresh adjudication.

3. In the counter-affidavit the following contentions are raised:-

1. The application to set aside the notice of insolvency is barred by time in view of the fact that the same had not been filed within 35 days from the date of service of the notice of the insolvency;

2. Since the allegation that the firm had not been doing business for six years is denied, the firm is deemed to be carrying on business as per the view taken by the Division Bench of this Court;

3. In view of the fact the debtors are indebted for a liquidated sum to the creditor the insolvency notice cannot be set aside.

4. The points for determination on the basis of the pleas raised by both sides are as follows:-

(1) Whether the first applicant/firm was carrying on business within a year before the presentation of the petition?
(ii) Whether this Court has jurisdiction to adjudicate the second applicant as insolvent?
(iii) Whether this application is barred by time?

5. The first contention raised on behalf of the applicants by Mr.K.N.Balasubramaniam is that in view of the earlier adjudication in I.P.No.129 of 1976 on 25th August, 1977, the applicants, *viz.* the firm and its partners, had been adjudicated and the appeal filed against that adjudication, *viz.* O.S.A.No.80 of 1977, was also dismissed. In another I.P.No.66 of 1977, filed by another creditor the order of appointment of an Interim Receiver was made and the same is pending in the appeal. The case of the applicants is that ever since the filing of I.P.No.129 of 1976 they stopped business. The Official Assignee represents that in pursuance of the order of this Court in I.P.No.66 of 1977 he had taken possession of the premises in which the business was carried on, two other items of immovable properties and a garden land. The Official Assignee had not carried on the administration further in view of the orders of stay passed by the Supreme Court. Considering the facts of this case it cannot be said that the applicants have carried on the business even after the order of adjudication passed by this Court. From the statement of the Official Assignee, it is seen that he had taken possession of the business premises. When the business premises was taken over, the business cannot be carried on unless it is shown that the applicants are carrying on business in some other premises. No such evidence is forthcoming in this application. There is no difficultry in coming to the conclusion that the applicants are not carrying on business after the order of adjudication passed against them. On behalf of the respondent reliance is placed upon the case reported in *B.C.MUNIRATHNAM NAIDU v. M/s. MEENA FINANCIERS AND OTHERS*, (1977)2 M.L.J. 399= I.L.R. (1978)1 Mad.169= (1977) T.N.L.J.286= 90 L.W.539= A.I.R.1978 Mad.46 where a Division Bench of this Court has held that the debtor is deemed to have carried on business as long as the liability in respect of trade debt remains undischarged. In that case, the debtor was an individual and not a firm. The Division Bench of this Court merely reiterated the principles laid down in *GOKULDOSS v. DWARKADOSS*, (1925) 49 M.L.J.457= A.I.R.1925 Mad.1249= I.L.R.48 Mad.795= 22 L.W.411 and *THEOPHILE v. SOLICITOR GENERAL*, (1950)1 All E.R.405. In the case reported in *GOKULDOSS v. DWARKADOSS*, (1925) 49 M.L.J.457= A.I.R.1925 Mad.1249= I.L.R.48 Mad.795= 22 L.W.411 one of the creditors obtained a decree against the debtor and threatened to file insolvency proceedings. One of the partners of the firm filed a suit for dissolution of the firm and had a Receiver appointed and subsequently contended that since the Receiver had taken possession of the business the debtors are not carrying on the business and, hence, unless the debtors are shown to have carried on the business within one year before the presentation of the petition they cannot be adjudicated as insolvent. On these facts the Division Bench of this Court came to the conclusion that the Receiver carrying on the business will amount to the debtors carrying on the business and, hence, the debtors are deemed to be carrying on business. In the case reported in *THEOPHILE v. SOLICITOR GENERAL*, (1950)1 All E.R.405 the debtor who left England and settled in Ireland contended that he is not carrying on the business. The House of Lords held that till the trade debts are discharged, he will be deemed to be carrying on the business. In both the above cases the conduct of the business had not been put end to by any order of the court, whereas in this case there is an order of adjudication and taking possession of the business premises by the Official Assignee, which clearly shows that the continuance of business is not possible. Hence the principles laid down in *GOKULDOSS v. DWARKADOSS*, (1925) 49 M.L.J.457= A.I.R.1925 Mad.1249= I.L.R.48 Mad.795= 22 L.W.411 and in *THEOPHILE v. SOLICITOR GENERAL*, (1950) 1 All E.R.405 cannot be applied to the facts of this case. In *B.C. MUNIRATHNAM NAIDU v. M/s. MEENA FINANCIERS AND OTHERS*, (1977) T.N.L.J.286= 90 L.W.539= (1977)2 M.L.J.399= I.L.R. (1978)1 Mad.169= A.I.R.1978 Mad.46 the principles from the above two decisions are simply quoted and the circumstances leading to adjudication are not stated.

Since the application of the above principle depends upon the facts of the case, the above decision cannot be readily applied to the facts of this case. Considering the entire circumstances the contention of the respondent that the applicants will be deemed to be carrying on business till the debts are discharged in spite of their earlier adjudication and consequent vesting of the business and the properties in the Official Assignee, cannot be upheld.

6. The second point to be considered in this case is whether the second applicant, viz. Raghava Reddy, can be adjudicated as insolvent since he is said to be now residing in U.S.A. It is stated further that he has gone to U.S.A.for medical treatment. On behalf of the applicants, it is contended that he has not permanently settled in U.S.A. and he had gone there temporarily. Further, evidence as to whether he has become the citizen of U.S.A. is also not forthcoming. Hence the argument based upon residence will have to be negatived.

7. The third point to be considered is whether the application is barred by time. In this case, the insolvency notice was issued on 22nd June, 1983. It was served on 1st September, 1983 and the application to set aside the insolvency notice was filed on 27th September, 1983 26 days after the service of insolvency notice. Hence this application is in time.

8. In the result, in view of my conclusion on the first point the applicants cannot be adjudicated as insolvents under section 9(2) of the Act. Consequently the Insolvency Notice No.28 of 1983 is set aside and this application is allowed. There will be no order as to costs.

R.S. ----- *Application allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *V.Ramaswamy and V.Ratnam, JJ.*

*Appeal Nos.743 of 1980 etc. 1st March, 1983.

Director of Survey cum Land Acquisition Officer, Pondicherry and others *Appellants**

v.

Mohammed Ghouse and others *Respondents.*

(A) Land Acquisition Act (I OF 1894), sections 18, 23 and 24 - Compensation for lands acquired by Government - Determination of - Duty of the Court - Marking of documents necessary - Mere mention of sales in the award not sufficient - Statistics collected by Tahsildar not evidence - Sales of normal sites in the locality are best evidence - Market value - Claimants to be given the most advantageous market price - Right of claiment to statutory solatium and interest.

(B) Civil Rules of Practice - Rules 79 and 84 - Duty of the Court - Documents appended in the judgment in chronological order.

Sections 23 and 24 of the Land Acquisition Act lay down the matters which should be considered in determining the compensation and matters which ought to be neglected in that process. These provisions have to be primarily kept in view in the disposal of references under section 18 of the Land Acquisition Act. Instances of normal sales of like property in the locality of acquisition enjoying the same or similar advantages would be the best evidence for the ascertainment of the market value of the acquired lands. Special features and advantages have also to be carefully considered. Potential user has to be given due weight. All these must necessarily enter into the computation and the determination of the market value. To afford evidentiary basis for the purpose of ascertaining the market value of the lands as aforesaid, such

documents of sales have to be marked in evidence. It would not suffice if those instances of sales are mentioned in the award and merely referred to by court and relied on. The documents, be they originals or registration copies of the instances of sales, must be marked in evidence and form part of the record. *[Para.2]*

A mere reference to the instances of sales found mentioned in the statistics collected by either the Tahsildar or the concerned department for passing an award would not be evidence in the proceedings in the absence of the production and marking in evidence of the documents themselves. No reliance can be placed on a document not before the Court. The examination of the parties would be necessary for further elucidating the circumstances under which the document came to be executed as well as the nature of the property and the special features therein, if any. If on such evidence, the market value of the acquired land is ascertained the claimants ought to be given the benefit of the most advantageous market price and fixing an average market price with reference to the data available ought to be avoided.

The Government has fixed up guideline-values in respect of various categories of lands like dry, wet, house-site, etc. The guidelines are relevant as the market value of the property cannot be different for purposes of stamp duty and for furposes of payment of compensation to the owner who had been deprived of the same. Where such guidelines are available with reference to a particular property acquired, the market value shown therein would be the minimum to which the claimant will be entitled, unless the claimant is in a position to show that for other reasons the market value ought to be higher than that mentioned in the guideline. *[Para.2]*

Where guidelines are not available with respect to a particular property, guidelines with reference to neighbouring properties may be considered to ascertain the market value. Where a rigid adherence thereto may not be possible there must be an overall consideration of all the relevant aspects in fixing the market value, even on the basis of the guidelines. *[Para.2]*

Apart from marking the instances of sales, guidelines, plan, topoketch, etc, as evidence at the end of the proceedings, there should be indicated at the end of the judgment not only the documents provided in the proceedings chronologically but it should also set out the names of the persons who have been examined either on behalf of the claimants or the State. *[Paras.3 and 4]*

In all cases where the market value is re-determined for purpose of awarding compensation, the court is under a duty to award the statutory solatium and interest. Those reliefs are available to the claimants under sections 23(2) and 28 of the Act. It is not as if these are matters in the discretion of the Court. *[Para.9]*

Ordinarily post-notification sales are not to be solely relied upon as it is not improbable that the proposal for acquisition had boosted up the market value of the property dealt with by those sales. *[Para.8]*

Small bits cannot be taken as the basis for the purpose of fixing the market value of acquisition of large extents of land. *[Para.19]*

The Court should bear in mind and give effect to rules 79 and 84 of the Civil Rules of Practice which are applicable to the territory of Pondicherry in letter and spirit and all documents admitted in evidence should be chronologically indexed and appended to the judgment. *[Para.22]*

Govt. Pleader for Pondicherry, for Appellant.

S.Sridevan, *G.Masilamani* and *J.Jagannathan*, for Respondents.

The Judgment of the Court was delivered by

Ratnam, J.:- We have resorted to a group disposal of all these appeals, not because common questions of fact or law arise for decision in these appeals, but on account of the judgments appealed against being vitiated by one or more of errors and infirmities common to them all. The judgments appealed against are so unsatisfactory that we have also been provoked into a restatement of the basis of the procedure in relation to references under section 18 of the Land Acquisition Act and the manner in which they should be dealt with and disposed of by the courts. Broadly and briefly stated, for the purpose of various housing schemes, provision of house sites to Harijans, for construction of ESI dispensary and staff quarters, for widening the Tindivanam Road, for the formation of by-pass road (east coast road) and for assignment of free house sites to the landless labourers in the rural areas, large extents of land situate in Kurumbapet, Saradapet, Olandai, Thattanchavadi, Ouigaret, Murgambakkam, Ariyankuppam, Temgathittu, Kuruvinathan and Goodapakkam were acquired under the provisions of the Land Acquisition Act. The notifications under section 4(1) of the Land Acquisition Act, were dated 21st October, 1975, 1st February, 1974, 2nd March, 1976, 1st September, 1979, 27th March, 1971, 9th April, 1974, 4th April, 1978, 18th May, 1976, 18th October, 1977, 28th September, 1976, 11th May, 1976 and 29th June, 1977 respectively. Before the Land Acquisition Officer, the owners of the acquired lands prayed for the determination of the market value of the acquired lands at figures, which varied considerably from owner to owner. On the basis of the sales statistics, the Land Acquisition Officer arrived at the market value of the acquired lands at different figures viz. Rs.45 per acre, Rs.34.47 per kuzhi, Rs.338.98 per acre, Rs.854.70 per acre, Rs.206.93 per kuzhi, Rs.488.88 per acre, Rs.430 per acre, Rs.394 per acre, Rs.250 per acre, Rs.196.48 per acre, Rs. 339 per acre, and Rs.251.71 per acre. Not satisfied with the aforesaid fixation of the market value of the lands acquired, several claimants sought a reference to court under section 18 of the Land Acquisition Act and the Sub court, Pondicherry, determined the market value of the lands acquired at different rates, viz. Rs.373.56 per acre, Rs.373 per acre, Rs.130 per kuzhi, Rs.5,918 per acre, Rs.2,000 per kuzhi, Rs.2.50 per sq.ft., Rs.3.50 per sq.ft., Rs.6.50 per sq.ft., Rs.3.25 per sq.ft., Rs.800 per kuzhi, Rs.500 per kuzhi and Rs.373.80 per acre. Complaining that the method as well as the manner of fixation of the market value of the acquired lands by the court below is erroneous, the State has preferred these appeals.

2. The learned Government Pleader contended that in the process of ascertaining the market value of the acquired properties for the purpose of awarding compensation to the owners thereof, the court below had proceeded on the basis of documents, which had not been marked in evidence and with reference to guidelines which had not been brought into evidence and with reference to post-section 4(1) notification sales also. In addition, it was also pointed out that in some cases, the court had proceeded to adopt the guideline values of house sites with reference to the wet and dry lands acquired, while the guideline values with reference to the lands acquired were available. Further, it was also brought to our notice that in a few of the cases, the court below had not awarded the solatium and interest as contemplated by the statute. Yet another defect was also brought to our notice in that in some of the cases, the court below had not incorporated at the end of its judgment a chronological index of the documents marked as evidence in the proceedings and a list of witnesses examined and therefore, there was no knowing as to on what documents and oral evidence, if any, the court below had proceeded to fix the market value of the acquired lands. On the other hand, counsel appearing for the owners of the acquired lands in these appeals would attempt to support the determination of the market

value by the court below and say that though the criticism levelled with reference to the method as well as the manner of disposal of the matters by the learned Subordinate Judge may, to some extent, be justified, yet, the award of compensation on the basis of the guidelines and other materials, is just and reasonable and therefore, does not deserve to be disturbed. We have carefully perused the judgments of the court below in all these appeals. We have also bestowed our careful attention to the submissions made on both sides. Sections 23 and 24 of the Land Acquisition Act lay down the matters which should be considered in determining the compensation and matters which ought to be neglected in that process. These provisions have to be primarily kept in view in the disposal of references under section 18 of the Land Acquisition Act. We may however observe that in matters relating to award of compensation arising under the Land Acquisition Act, a duty is cast on the court to determine, on the basis of evidence, the market value of the land acquired, which a willing buyer would be inclined to pay, if sold by a willing seller on the date of the notification under section 4(1) of the Land Acquisition Act. To enable the court to justly and reasonably award compensation to the owner of the property who has been deprived of the same, several matters have to be considered and taken into account. Instances of normal sales of like property in the locality of acquisition enjoying the same or similar advantages would be the best evidence for the ascertainment of the market value of the acquired lands. Special features and advantages have also to be carefully considered. Potential user has to be given due weight. All these must ncessarily enter into the computation of and the determination of market value. To afford evidentiary basis for the purpose of ascertaining the market value of the lands as aforesaid, such documents of sales have to be marked in evidence. It would not suffice if those instances of sales are mentioned in the award and merely referred to by court and relied on. The documents, be they originals or registration copies of the instances of sales, must be marked in evidence and form part of the record. That would enable the State as well as the claimants not only to place all the relevant documents before court, but it would also further assist in finding out the circumstances under which a transaction had been entered into by an examination of the parties to the transaction, if necessary. This would facilitate the court to ascertain whether a particular instance of sale relied upon is a normal one or not and whether the price reflected under that transaction is reasonable or not. A mere reference to the instances of sales found mentioned in the statistics collected by either the Tahsildar or the concerned department for passing an award would not be evidence in the proceedings in the absence of the production and marking in evidence of the documents themselves. No reliance can be placed on a document not before court. The examination of the parties would be necessary for further elucidating the circumstances under which the document came to be executed as well as the nature of the property and the special features therein, if any. If on such evidence, the market value of the acquired land is ascertained, the claimants ought to be given the benifit of the most advantageous market price and fixing an average market price with reference to the data available, ought to be avoided. In addition to instances of sales, the guidelines issued by the Government with reference to the market value of the lands would also furnish an acceptable and reliable basis for the purpose of ascertaining the market value of the acquired lands. For purposes of payment of stamp duty, while registering documents, the Government has fixed the market value of the properties, either by grouping them together into blocks or even with reference to individual survey fields. In cases where such guideline is available immediately prior to the notification under section 4(1) of the Land Acquisition Act with reference to the particular property acquired or with

reference to the block in which the property acquired may be situated, then that guideline has to be taken into account and considered after marking it as evidence in the proceedings. Though it may be that the guidelines issued by the Government in some cases may not be in relation to the particular property acquired, but with reference to a nearby property, in such a case also; the court can consider the guideline available as a piece of evidence reflecting the value or the market price near about the acquired property at the time the guideline was issued. The Government has fixed up guideline values in respect of various categories of lands like dry, wet, house site, etc. The guidelines are relevant as the market value of the property cannot be different for purposes of stamp duty and for purposes of payment of compensation to the owner who had been deprived of the same. Where such guidelines are available with reference to a particular property acquired, the market value shown therein would be the minimum to which the claimant will be entitled, unless the claimant is in a position to show that for other reasons the market value ought to be higher than that mentioned in the guideline. As stated earlier, where it is possible to obtain a guideline value with reference to the particular property under acquisition immediately before the notification under section 4(1) of the Land Acquisition Act, that would be the best material available and the minimum that should be made available to the claimant by way of compensation would be the amount so mentioned in the guideline; but this may not always be so. Where the guideline is not available with reference to the particular property acquired the court can take into consideration the guidelines with reference to the neighbouring properties. Even in such cases, it would be open to the claimants to establish that compensation at a rate higher than that mentioned in the guidelines should be awarded on account of some special features or peculiar advantages which would enhance the value of the acquired property. In so considering the guidelines, the court ought to be careful against the application of the guideline value in respect of wet lands to dry lands and dry lands to house sites or *vice versa*. The ascertainment of the market value of the acquired property has primarily to be done with reference to the classification of the property in the revenue records though that is not an inflexible rule. Weightage has to be given to the potential value, *viz.* the possibility of the property being put to diverse uses like house-sites, etc., the nearness to habitation and the advantages and other amenities enjoyed by it. Though the guidelines may be pressed into service as the best material for the purpose of ascertaining the market value of acquired lands a rigid adherence to the guideline value may not be possible in every case but there must be an overall consideration of all the relevant aspects in the matter of fixation of the market value of the acquired lands even on the basis of the guidelines.

3. In the matter of fixing the market value of the acquired lands with reference to other instances of sales, it is essential that the court should have before it a plan of the acquired property, as well as as toposketch, clearly delineating the acquired lands and also indicating thereon the data sales, relied on by the State and other relevant details. It is at once plain that providing this should be the duty of the State, as the claimant may not be in a position to secure the plan, as well as the details of the other relevant data relating to sales of lands in the vicinity. It would be easy for the Government to have the plan as well as the toposketch prepared in order to see to it that the court in in a position to appreciate the situation of the land, the advantages and amenities enjoyed by it, the location as well as the situation of the other lands taken as data lands, etc.

4. Apart from marking the instances of sales, guidelines, plan, toposketch, etc. as evidence at the end of the proceedings, it would be necessary to

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *S.Nainar Sundaram, J.*

*W.P.No.2560 of 1984. 13*th July*, 1984.

P.K.Ramasamy *Petitioner**

v.

The Joint Registrar of Co-operative Societies, North Arcot Region, Vellore, North Arcot District and another *Respondents.*

Tamil Nadu Co-operative Societies Act (Tamil Nadu Act (LIII of 1961), section 72(i)(a) - Issue of Show Cause Notice under the section - Consultation with Financing Bank whether necessary before issuance of such notice.

Held:-Though consultation under section 72(6) of the Tamil Nadu Co-operative Societies Act, 1961, must precede the actual order of supersession of a Society it is not necessary that there ought to have been a consultation with the Financing Bank before the issuance of the show cause notice. Section 72(6) speaks about 'before taking any action under sub- section(1)'. The only concrete action under sub-section(1) is that of supersession. Action need not necessarily be equated to the very initiation of the proceedings under section 72(1)(a) by the issuance of a show cause notice. The affording of an opportunity to make representation precedes the action of supersession. But, that by itself is not the action of supersession. *[Para.6]*

Cases referred to:-

P.M.V.Credit Society v. Registrar of Co-operative Society, (1973)2 M.L.J. 200=86 L.W.494= A.I.R.1973 Mad.460;*Joint Registrar of Co-operative Societies v. P.S.Rajagopala Naidu*, (1971)1 M.L.J. (S.C)63= (1971)1 An.W.R. (S.C.)63= (1971)1 S.C.J.468= (1971)1 S.C.R.227= A.I.R.1970 S.C.992.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *Certiorari*, calling for the records relating to the proceedings of the first respondent made in Na.Ke.32519/82/B-5 dated 12.1.1984 and quash the same.

G.Devadas for Pathy and Sundaram, for Petitioner.

P.Chandra Sekaran, for Respondents.

The Court made the following

ORDER:- The petitioner challenges a show-cause notice issued under section 72(i)(a) of the Tamil Nadu Co-operative Societies Act, 1961 (Tamil Nadu Act 53 of 1961), hereinafter referred to as the Act. As on date, admittedly no final orders of supersession has been passed. Only a show-cause notice has been issued. Mr.G.Devadoss, learned counsel appearing for the petitioner, admits that the petitioner has submitted his explanation in answer to the above show-cause notice. Learned counsel would state that even before the issuance of the show-cause notice, there ought to be a consultation with the Financing Bank as per section 72(6) of the Act, and in support of this proposition, he relies on a pronouncement of a Bench of the High Court of Orissa in *SARAT CHANDRA v. STATE*, (A.I.R.1979 Orissa 143), where provisions similar to section 72(6) of the Act were considered. It is true that the said pronouncement supports the proposition advanced by the learned counsel for the petitioner. But, so far as this Court is concerned, there is a pronouncement of Ramanujam, J. in *K.THANGAVELU v. JOINT REGISTRAR, CO-OP. SOCIETY*, (A.I.R.1976 Mad.280). It is directly to the point and the learned Judge has categorically opined that consultation is necessary only before final order of supersession is passed. While doing so, the learned Judge relied on the observations of Ramaprasada Rao, J. as he then was, in *P.M.V.CREDIT SOCIETY v. REGISTRAR OF CO-OPERATIVE SOCIETY*, (1973)2 M.L.J.200= 86 L.W.494= A.I.R. 1973 Mad.460 .

2. The observations of Ramaprasad Rao, J. as he then was, in the decision referred to above run as follows:-

". . . Obviously, such consultation begins after the Registrar is subjectively satisfied an objective materials placed before him that a *prima facie* case has been made out for the purpose of superseding the co-operative society. It is only at that point of time that the necessity for consulting the Financing Bank arises. This has been held to be a mandatory requirement by the highest Court of the land. Such a consultation, therefore, cannot be avoided. Though consult tion is not equivalent to concurrence, yet, there must be material on record to show that, after the Registrar entertained an opinion about the unsatisfactory working of a registered society, he should consult the financing bank to whom the society is indebted before be finally passed an order of supersession under section 72 of the Act."

The contention that was put forth before Ramanujam, J. and the reasoning of the learned Judge for repelling the said contention are found in the following passages in the judgment of the learned Judge:

" . . . Mr.N.C.Raghavachari, the learned counsel for the petitioner, contends that having regard to the language of section 72(6) the first respondent has to consult the financing bank before taking any action under section 73(1) including the action of issuing the show cause notice, that by issuing the show cause notice the first respondent had initiated the proceedings under section 72(1) and that for such initiation of the proceedings the consultation with the financing bank is necessary.

"But on a due consideration of the matter, I am inclined to think that, having regard to the object of the provision under section 72(6) which requires the consultation of the financing bank, such consultation is necessary before the final order is passed under section 72(1). At the stage of the issue of the above show cause notice no one knows as to what is going to happen ultimately. It is only when the first respondent makes up his mind after due enquiry in relation to the irregularities referred to in the show cause notice, that the financing bank has to be consulted with regard to the action proposed to be taken. If the consultation is before the issue of show cause notice and if the first respondent ultimately finds that the irregularities referred to in the show cause notice have not been established, the consultation earlier obtained will become a mere formality and it would be a sheer waste of time. The matter is also clear if we consider the question of prejudice that will be caused to the petitioner. The petitioner can complain that the consultation has not been made only if the enquiry arising out of the show cause notice ultimately results in an order of supersession under section 72(1). I am therefore, of the view that consultation as contemplated by section 72(6) is necessary before the final order is passed under section 72(1) and not before the issue of show cause notice."

3. The Bench of the Orissa High Court has drawn support for its view from a certain passage occurring in the judgment of the Supreme Court in *JOINT REGISTRAR OF CO-OPERATIVE SOCIETIES v. P.S.RAJAGOPALA NAIDU*, (1971)1 M.L.J. (S.C) 63= (1971)1 An.W.R.(S.C) 63= (1971)1 S.C.J.468= (1971)1 S.C.R.227= A.I.R.1970 S.C.992 and in particular the following sentence, and more so the underlined portion occurring in the judgment of the Supreme Court:-

"There is no other requirement or condition precedent laid down by the Legislature which the Registrar must <u>fulfil before he acts in the matter of supersession of the committee..."</u>

4. Section 72(1)(a) of the Act reads as follows:-

"If, in the opinion of the Registrar, the committee of any registered society is not functioning properly

or wilfully disobeys or wilfully fails to comply with any lawful order or direction issued by the Registrar under this Act or the rules, he may, after giving the committee an opportunity of making the representations, by order in writing, dissolve the committee and appoint either a person (hereinafter referred to as the special officer) or a committee of two or more persons (hereinafter referred to as the managing committee) to manage the affairs of the society for a specified period not exceeding two years."

Section 72(6) reads as follows:

"Before taking any action under sub-section(1) in respect of any registered society, the Registrar shall consult the financing bank to which the society is indebted.".

Before the Supreme Court, in the decision referred to above, the present question did not arise for consideration even remotely. The two question considered by the Supreme Court, set out in paragraph 5 of the judgment, were as follows:

"(i) whether the Registrar before taking action under section 72 must have an audit made under section 64 and inquiry held under section 65 and an inspection made under section 66 of the Act and must also give an opportunity for rectification of the defects which may come to light as a result of such audit, inquiry or inspection?
(ii) What is the scope of interference by the High Court with the order of a Registrar made under section 72 of the Act."

5. In *P.M.V.CO-OP. CREDIT SOCIETY v. REGISTRAR OF CO-OPERATIVE SOCIETY*, (1973)2 M.L.J.200= 86 L.W.494= A.I.R.1973 Mad.460, the competency of supersession without consultation under section 72(6) was put in issue. The facts, as disclosed by the judgment, make out that the financing bank itself passed the resolution that the affairs of the concerned society were not satisfactory and it made a request to the Registrar to dissolve the same. It was on this, further action under section 72 was started and on the basis of the resolution of the financing bank and without any mere consultation with it, the order of supersession was passed. In the above context, Ramaprasada Rao, J. as he then was, made the observation extracted above.

6. On my own appraisal of the provisions, I am also of the view that though the consultation under section 72(6) must precede the actual order of supersession, it is not necessary that there ought to have been a consultation before the issuance of the show cause notice. Section 72(6) speaks about "before taking any action under sub-section (1)". The only concrete action under sub-section (1) is that of supersession. Action need not necessarily be equated to the very initiation of the proceedings under section 72(1)(a) by the issuance of the show cause notice. The affording of an opportunity to make representation precedes the action of supersession. But, that by itself is not the action of supersession. I have no reason and I have not been persuaded to take a view different from that of the two learned Judges of this Court. In this view, the writ petition fails and the same is dismissed. There will be no order as to costs.

R.S. ----- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *V.Ratnam, J.*

*C.R.P.Nos.2350 and 3351 of 1983.
17th April, 1984.

Lakshminarayana Reddiar *Petitioner**

v.

T.K.S.Balarama Chettiar *Respondent.*

(A) Tamil Nadu Debt Relief Acts (40 of 1978) and (13 of 1980) - Suit on a promissory note - Claim for recovery of one half of the principal amount as well as one half of the interest invoking provisions of Act 40 of 1978 - Suit decreed - Suit brought subsequently for recovery of balance of amount on the basis of the provisions of Tamil Nadu Act 40 of 1979; 13 of 1980 - Maintainability - Suit held not barred - Impact of Act 40 of 1979 on Act 40 of 1978 examined.
(B) Civil Procedure Code (V of 1908), Order 2, rule 2 - Applicability.

The petitioner had executed three promissory notes in favour of the respondent on 24.2.1971, 19.9.1974 and 26.11.1974 respectively. In respect of the 1971 promissory note, O.S.No.1910/78 was filed for recovery of one half of the principal and one half the interest in accordance with the provisions of Tamil Nadu Act 40 of 1978 stating that there was a statutory discharge of and interdict against recovery of anything more by reason of Tamil Nadu Ordinance V of 1978 and Act 40 of 1978 and that the suit claim was within time by virtue of certain endorsements on the pronote and the bar against institution of suits against agriculturists continuously from 15.1.1975 to 15.7.1978. The petitioner also endorsed on the plaint on 8.3.1979 submitting to a decree as prayed for with a request for six months time for payment. A decree was passed accordingly. On the pronote dated 19.9.1974 O.S.No.1909 of 1978 was filed for recovery of one half of the principal and one half of the interest on allegations similar to those in the other suit and the petitioner submitted to a decree as in the other case. The decrees so obtained were not satisfied. While so, the respondent instituted O.S.2627 of 1981 for recovery of further amounts under the 1971 pronote invoking the provisions of Tamil Nadu Act 40 of 1979 as having removed the disability imposed by the 1978 Act against recovery of such amounts. It was also stated that the petitioner (defendant) was not entitled to claim the benefits of Tamil Nadu Act 13 of 1980. The petitioner pleaded the bar under Order 2, rule 2 of the Civil Procedure Code against the present suit and claimed *inter alia* the bar of limitation as well. O.S.2626 of 1981 was instituted by the respondent in respect of the pronote of 19.9.1984 for recovery of further sums and for the recovery of the full amount due under the pronote of 26.11.1974. The petitioner raised similar defences as in O.S.No.2627 of 1981. The lower court held that the suits were maintainable, that Order 2, rule 2 of the Civil Procedure Code was inapplicable and that the suits were not barred by limitation.
On revision to the High Court against the order;

Held:- Though under the Tamil Nadu Act 40 of 1978 a particular scheme of scaling down and discharge had been provided that had been totally abrogated, annulled and set at nought by Tamil Nadu Act 40 of 1979. Sections 7(1) and (2), 8 and 31 to 36 of the latter Act show that excepting a case falling within section 33(2), the earlier proceedings taken under the 1978 Act would all abate and to every debt the scaling down provisions of the 1979 Act have to be applied. *[Para.7]*

The statutory discharge of wiping out of one half of the principal and one half of the interest provided for under section 7(1)(b) of Tamil Nadu Act 40 of 1978 was removed or erased by the provisions of Tamil Nadu Act 40 of 1979. Particularly section 23(1) of Tamil Nadu Act 40 of 1979 made provision for the revival or restoration of the liability deemed to have been discharged under the provisions of Tamil Nadu Act 40 of 1978, as if that Act was not passed. That

would mean that the deemed discharge provided for under section 7(1)(b) of Tamil Nadu Act 40 of 1978 would be deemed never to have taken place at all. That in turn would revive the right to recover one half of the principal and one half of the interest therein deemed to have been discharged under section 7(1)(b) of the Tamil Nadu Act 40 of 1978. That such a revived or restricted right could also be enforced by excluding the time between 15th June, 1976 and ending with the date of publication of Tamil Nadu Act 40 of 1979 in Tamil Nadu Government Gazette is clearly established by section 34(1) of Tamil Nadu Act 40 of 1979. Thus a consideration of the provisions of the Tamil Nadu Act 40 of 1979 clearly establishes that the deemed discharge of the liability in respect of one half of the principal and one half of the interest under the provisions of Tamil Nadu Act 40 of 1978 was not preserved under Tamil Nadu Act 40 of 1979, but on the contrary, the discharge of liability under the provisions of Tamil Nadu Act 40 of 1978 was wiped out as if Tamil Nadu Act 40 of 1978, had not been passed. The right to recover the entire amount due to the creditor was made available to him, subject to the provisions of section 7 and 8 of the Tamil Nadu Act 40 of 1979, and the right of action was also saved from the bar of limitation. The statutory deemed discharge under Tamil Nadu Act 40 of the 1978 having been statutorily undone by the provisions of Tamil Nadu Act 40 of 1979, whatever rights were originally available to the creditor were restored to him, protected from the bar of limitation to be enforced within the framework of Tamil Nadu Act 40 of 1979. *[Para.7]*

Section 16 of Act 40/79 providing for amendment of decrees pre-supposes the Court having passed a decree for the repayment of a debt. In this case there was no decree at all with reference to one half of the principal amount and one half of the interest in the suits C.S.Nos.1910 and 1909 of 1978 because of the statutory discharge under section 7(1)(b) of Act 40 of 1978 as it then stood. Hence in the absence of any decree passed by the Court with reference to one half of the claim towards the principal and the one half of the interest, section 16 of the Tamil Nadu Act 40/79 cannot be held applicable to the respondent. *[Para.8]*

The right to recover one half of the principal and one half of the interest thereon was restored to the respondent by the provisions of Tamil Nadu Act 40 of 1979 and that claim was also preserved intact under section 34 of the Act so that that right could be enforced without in any manner being affected by the provisions of the 1978 Act. Precisely that was done by the respondent by instituting C.S.Nos.2627 and 2626 of 1981. No exception can therefore be taken to the maintainability of the suits. *[Para.9]*

At the time of O.S.Nos.1910 and 1909 of 1978 the respondent was not entitled to claim the whole of the amount. Equally there was no volitional omission on the part of the respondent to sue for one half of the amount, nor any intentional relinquishment so as to attract the application of Order 2, rule 2, Civil Procedure Code. The relief claimed in O.S.Nos.2627 and 2626 of 1981 did not exist at the time of the earlier suits. Hence, there is no question of bar under Order 2, rule 2. *[Para.10]*

Case referred to:-

Muthuveerappa Chetty v. Adaikappa Chetty, (1920) I.L.R.43 Mad.845= 39 M.L.J.312= 12 L.W.240.

Petition under section 115 of Act V of 1908 praying the High Court to revise the orders of the court of the District Munsif, Vridhachalam dated 21-2-1983 and made in O.S.Nos.2627 and 2626 of 1981 respectively.

R.S.Venkatachari, for Petitioner.

K.Sampath, for Respondent.

The Court delivered the following

JUDGMENT:- These Civil Revision Peti-

tions have been preferred by the defendant in O.S.Nos.2627 and 2626 of 1981 respectively, District Munsif's Court, Vridhachalam. These suits were instituted by the respondent herein for the recovery of certain amounts from the petitioner on the basis of promissory notes dated 24-3-1971, 19-9-1974 and 24-11-1974. The promissory note dated 24-3-1971 formed the subject-matter of O.S.No.2627 of 1981, while, O.S.No.2626 of 1981 related to the other two promissory notes dated 19-9-1974 and 24-11-1974. In so far as the promissory note dated 24-5-1971 is concerned, the respondent earlier filed O.S.No.1910 of 1978 for the recovery of one-half of the principal amount as well as one half of the interest in accordance with the provisions of Tamil Nadu Act 40 of 1978. In the course of that suit, the respondent stated that as the petitioner was entitled to the benefits of Tamil Nadu Ordinance V of 1978 and also Tamil Nadu Act 17 of 1976 and there was a statutory discharge of and interdict against the recovery of anything more than one half of the principal and one half of the interest, the balance alone statutorily due was claimed. That claim was also further stated to be in time on account of the endorsements made on the promissory note on 21.3.1973 and 17.9.1974 and also on account of the bar against the institution of suit against agriculturists having been in force between 15.1.1975 and 15.7.1978 and the benefits of Tamil Nadu Ordinance V of 1978 and Tamil Nadu Act 17 of 1976 being available to the petitioner. On 8.3.1979, the petitioner made an endorsement on the plaint in O.S.No.1910 of 1978 submitting to a decree as prayed for, but praying for six months time to make the payment and accordingly, on the same day, a decree in favour of the respondent was granted in O.S.No.1910 of 1978. Similarly, with reference to the promissory note dated 19.9.1974, in O.S.No.1909 of 1978, the respondent claimed the recovery of one half of the principal and one half of the interest due thereunder in accordance with the provisions of Tamil Nadu Ordinance V of 1978 and Tamil Nadu Act 17 of 1976. In that suit also, the petitioner submitted to a decree and the respondent was given a decree as prayed for. These decrees so obtained by the respondent in O.S. Nos.1910 and 1909 of 1978 have not been satisfied or discharged. While matters stood thus, the respondent instituted O.S.No.2627 of 1981. District Munsif's Court, Vridhachalam, against the petitioner for the recovery of further amounts under the promissory note dated 24-3-1971 stating that in the earlier suit in O.S.No.1910 of 1978, on account of the operation of the provisions of Tamil Nadu Act 40 of 1978 (Tamil Nadu Ordinance V of 1978 earlier), he was obliged to recover only one half of the principal and one half of the interest and that as a result of the coming into force of Tamil Nadu Act 40 of 1979, that disability was removed and, therefore, he was entitled to recover further amounts under the promissory note in accordance with the provisions of Tamil Nadu Acts 8 of 1973, 17 of 1976 and 40 of 1979 and that the petitioner was not entitled to invoke the benefits of Tamil Nadu Act 13 of 1980. The cause of action for this suit was stated to have arisen on the dates when endorsement of payments were made, namely, 21-8-1973 and 17-9-1974 and when the provisions of Tamil Nadu Act 40 of 1979 came into force removing the embargo upon the recovery of further amounts and the interest thereon. In his written statement, the petitioner contended that having regard to the institution of O.S.No.1910 of 1978 earlier and the obtaining of a decree therein, the institution of another suit for the recovery of the balance would not lie, as that would amount to splitting up of a single debt into two claims resulting in the institution of two suits for the recovery of a single debt arising under the same cause of action and that was not permissible. The provisions of Order 2, rule 2, Code of Civil Procedure, were invoked by the petitioner in bar of the suit. A further objection raised by the petitioner was to the effect that he had been assessed to agricultural income-tax and, therefore, the suit was barred. Yet another objection put forth was that the promissory note was not supported by consideration.

2. With reference to the promissory

notes dated 19-9-1974 and 24-11-1974, the respondent instituted O.S.No.2626 of 1981 claiming that he is entitled to recover from the petitioner further amounts on the promissory note dated 19-9-1974 in accordance with the provisions of Tamil Nadu Act 40 of 1979 and the entire amount due under the other promissory note dated 24.11.1974. In this suit also, the respondent referred to the institution of O.S.No.1909 of 1978 earlier for the recovery of one half of the principal and one half of the interest on the promissory note dated 19-9-1974 in accordance with the provisions of Tamil Nadu Ordinance V of 1978 (later Tamil Nadu Act 40 of 1978) and the passing of a decree therein on the basis of an endorsement made by the petitioner and the coming into force of Tamil Nadu Act 40 of 1979, which, according to the respondent, enabled him to recover further amounts under the promissory note dated 19-9-1974, in addition to the entire amount due to the petitioner on the promissory note dated 24-11-1974. The cause of action for this suit also was stated to be the execution of the promissory note on 19-9-1974 and the coming into force of Tamil Nadu Act 40 of 1979. To this suit also, the petitioner raised substantially the same defence as in O.S.No. 2627 of 1981.

3. Before the learned District Munsif, Vridhachalam, on behalf of the respondent herein, Exhibits A.1 to A.3 were marked in each of the suits and no oral evidence was let in by either side. On a consideration of the evidence, the learned District Munsif found that the promissory notes sued upon were fully supported by consideration that the suits as laid were maintainable, that Order 2, rule 2, Code of Civil Procedure, would not bar the suits and that the claims were in time. On these findings, decrees were granted in O.S.Nos. 2627 and 2626 of 1981 in favour of the respondent as prayed for by him. It is the correctness of this that is challenged in these Civil Revision petitions.

4. The first contention of the learned counsel for the petitioner is that the suits instituted by the respondent herein in O.S.Nos.2627 and 2626 of 1981 for the recovery of further amounts under the promissory notes, after the earlier institution of suits thereon in O.S.Nos.1910 of 1909 of 1978 and the obtaining of decrees therein in accordance with Tamil Nadu Act 40 of 1978, were not maintainable. On the other hand, the learned counsel for the respondent submitted that owing to the operation of the provisions of Tamil Nadu Ordinance V of 1978 and later Tamil Nadu Act 40 of 1978, the respondent was prevented by statute from recovering the entire amount due under the promissory notes, but was permitted to recover only one half of the principal and one half of the interest as was done in O.S. Nos.1910 and 1909 of 1978 and when the provisions of Tamil Nadu Act 40 of 1979 enabled the respondent to further recover amounts in accordance with the provisions of that Act, the respondent had taken steps for such recovery and inasmuch as the respondent had not in any manner waived his right to recover the amounts from the peitioner, there could be no bar for the institution of a suit to recover such further amounts as could be recovered under the provisions of Tamil Nadu Act 40 of 1979.

5. In order to appreciate this contention, it would be necessary at this stage to refer to the earlier provisions of Tamil Nadu Acts 40 of 1978 and 40 of 1979. Tamil Nadu Act 40 of 1978 repealed Tamil Nadu Ordinance V of 1978 and was intended to afford relief to the debtors by way of liquidation of debts and scaling down of debts as well. Under section 6(1) of Tamil Nadu Act 40 of 1978, all debts payable by any debtor on 14-7-1978 were to be scaled down in accordance with the provisions of Chapter II of that Act. A proviso was incorporated to section 6(1) to the effect that debts already scaled down under sections 8, 9, 10, 11 and 12 of Tamil Nadu Act 4 of 1938 or sections 7, 8, 9, 10 and 11 of Tamil Nady Act 38 of 1972 were not to be scaled down again under the provisions of Chapter II of Tamil Nadu Act 40 of 1978. Section 6(2) of the Act laid an embargo upon the

recovery of amounts in excess of the scaled down amount from a debtor or from out of his property. In other words, section 6(2) of Tamil Nadu Act 40 of 1978 confined and restricted the recoverability of a debt due from a debtor or from out of his property to that amount, which was the scaled down amount under Chapter II. Section 7 of Tamil Nadu Act 40 of 1978 provided for scaling down of the debt which had been on each occasion advanced or incurred before 14-7-1978 and payable by the debtor on that date. Section 7(1)(a) wholly discharged the whole of the principal amount together with interest, where on each occasion the principal amount advanced or incurred did not exceed Rs.500/-. Section 7(1)(b) made provision for cases in which the principal amount of debt advanced or incurred on each occasion was in excess of Rs.500/-, but did not exceed Rs.5,000/- and in such cases, one half of the principal amount so advanced or incurred and one half of the interest was deemed to be statutorily discharged and only the balance was repayable. Section 7(1)(c) dealt with a case where the principal amount of debt advanced or incurred was in excess of Rs.5,000/- but was less than Rs.10,000/-, in which case the principal amount alone was repayable and the interest was deemed to be wholly discharged. Explanations I to III to section 7(1) are not germane for purposes of the present case and need not, therefore, be noticed. Under section 7(2)(i) of Tamil Nadu Act 40 of 1978, if a debtor had already made payments towards principal or interest or both equal to or in excess of the aggregate amount as scaled down, then, the debt small be deemed to have been wholly discharged. In cases where there was a shortfall between the amounts already paid by a debtor towards principal or interest or both and the amount as scaled down under section 7(1), section 7(2)(ii) directed the repayment by the debtor of only so much of the amount as would make up such shortfall. A proviso to section 7(2) stated that subject to the provisions of section 18 of Tamil Nadu Act 40 of 1978, any payment made by a debtor already in excess of the amount scaled down either by way of principal or interest or both, would not entitle the debtor to a claim for refund. The other provisions of Tamil Nadu Act 40 of 1978 are not very relevant. There is no dispute in this case that the petitioner was a debtor within the meaning of section 2(3) of Tamil Nadu Act 40 of 1978 and that the debts were payable by him on 14-7-1978. Undoubtedly, therefore, under section 7(1)(b) of Tamil Nadu Act 40 of 1978, only one half of the principal amount and one half of the interest become repayable by the petitioner, which was also the amount recoverable by the respondent from the petitioner under section 6(2) of Tamil Nadu Act 40 of 1978. It is on this basis that the earlier suits in O.S.Nos.1910 and 1909 of 1978 were instituted by the respondent and decrees obtained and no dispute was raised by the petitioner that he was not a debtor entitled to the benefits of Tamil Nadu Act 40 of 1978. On the contrary, the petitioner made an endorsement on 8.2.1979 accepting the stand of the respondent and stating that he had no objection to the suits being decreed as prayed for, but praying that six months' time for payment may be granted and it was on this footing decrees were also passed. The plaints in O.S.Nos.1910 and 1909 of 1978 marked as Exhibit A.2 also proceeded on the basis of Tamil Nadu Ordinance V of 1978, which was subsequently repealed by Tamil Nadu Act 40 of 1978. It is, therefore, obvious that at the time of the institution of the suits in O.S.Nos.1910 and 1909 of 1978, the respondent could not have claimed the recovery of the entire amounts due under the promissory notes in view of the provisions of Tamil Nadu Ordinance V of 1978, subsequently replaced by Tamil Nadu Act 40 of 1978. It was only on account of that, the respondent was obliged to recover in O.S.Nos.1910 and 1909 of 1978 such amounts as were repayable by and recoverable from the petitioner in accordance with the provisions of Tamil Nadu Ordinance V of 1978, subsequently replaced by Tamil Nadu Act 40 of 1978. Put differently, there was a statutory bar imposed on the respondent by the provisions of section 6(2)

read with section 7(1)(b) of Tamil Nadu Act 40 of 1978 from recovering the entire amount due on the promissory notes sued upon in O.S.No.1910 and 1909 of 1978. All that the respondent was permitted under that statute to recover was only one half of the principal amount and one half of the interest and statutorily, the balance was deemed to be discharged. Therefore, a full satisfaction of the debt was statutorily brought about by enabling the creditor to recover one-half of the principal and one-half of the interest and providing for the statutory discharge of the balance.

6. While matters stood thus, Tamil Nadu Act 40 of 1979 was enacted for the purpose of providing relief to indebted persons. Under section 7(1) of Tamil Nadu Act 40 of 1979, all debts payable by any debtor on 14-7-1978 were to be scaled down in accordance with the provisions of Chapter II. The proviso thereto stated that a debt already scaled down under some of the provisions of Tamil Nadu Acts 4 of 1920 and 38 of 1972 was not to be scaled down again. Section 7(2) of Tamil Nadu Act 40 of 1979 provided that no sum in excess of the amount as so scaled down shall be recoverable from the debtor or from any land or interest in land belonging to his or by attachment and sale of his property. Under section 8, with reference to debts incurred prior to 14-7-1978, as in this case, scaling down was provided for. If a debtor had paid to the creditor one-and-a-half times the amount of the principal, whether by way of principal or interest or both, such debt, including the principal, was deemed to be wholly discharged. However, where the sums repaid by way of principal or interest or both, fell short of one-and-a-half times the amount of the principal, then, only so much of the amount, as would make up such shortfall, was repayable and no more. Section 8(3) enacted that nothing contained in clauses (1) and (2) of section 8 shall be deemed to require the creditor to refund any sum, which had been paid to him or to increase the liability of a debtor to pay any sum in excess of the amount, which would have been payable by him, if the Act (Tamil Nadu Act 40 of 1979) had not been passed. Explanations I to III to section 8 are unnecessary for purposes of this case. Section 16 provided for amendment of decrees passed by courts for the repayment of a debt before the publication of Tamil Nadu Act 40 of 1979 in the Tamil Nadu Government Gazette. Within six months from the date of such publication of Tamil Nadu Act 40 of 1979, on the application of any judgment-debtor, who is a debtor within the meaning of Tamil Nadu Act 40 of 1979, or of any member of the joint family or of the decree- holder, the court which passed the decree, notwithstanding anything contained in the Code of Civil Procedure, was enabled to amend the decree or enter up satisfaction. Sections 31 to 34 of Tamil Nadu Act 40 of 1979 are very important. Under section 31, effective from 15-7-1978, Tamil Nadu Act 40 of 1978, therein referred to as the said Act was repealed. Sections 32 to 34 became operative from 13-6-1979. Section 32(1) made inapplicable section 8 of the Tamil Nadu General Clauses Act, 1891, to the repeal of Tamil Nadu Act 40 of 1978 by Tamil Nadu Act 40 of 1979. Section 32(2) declared that proceedings taken under Tamil Nadu Act 40 of 1978 and pending before the date of publication of Tamil Nadu Act 40 of 1979 in the Tamil Nadu Government Gazette, shall abate. Under section 32(3), no legal proceedings or remedy in respect of any right, privilege, obligation or liability acquired, accrued or incurred under Tamil Nadu Act 40 of 1978 shall be instituted, continued or enforced under Tamil Nadu Act 40 of 1978. Section 33 provided for the removal of doubts. Section 33(1) referred to the discharge of any liability incurred or arising under a debt due from a debtor under Tamil Nadu Act 40 of 1978 and stated that such a liability incurred or arising under a debt due from a debtor shall be deemed never to have been discharged under Tamil Nadu Act 40 of 1978 as if that Act was not passed and that every debt shall be scaled down in accordance with the provisions of

Tamil Nadu Act 40 of 1979. Section 33(2) made an exception in case of proceedings in which orders passed had been executed or satisfied in full before the date of the publication of Tamil Nadu Act 40 of 1979 in the Tamil Nadu Government Gazette. Section 34 provided for exclusion of time for instituting suits and filing execution applications for purposes of limitation. Section 34(1) excluded the period commencing from 15-1-1976 upto the date of publication of Tamil Nadu Act 40 of 1979 in the Tamil Nadu Government Gazette for enforcing liability arising out of a debt due from a debtor against whom the institution of a suit or the making of an application for execution, was barred by Tamil Nadu Act 40 of 1978. Section 34(2) enabled the further proceedings in a suit or in relation to execution to be proceeded with under the provisions of Tamil Nadu Act 40 of 1979 from the stage reached when such proceedings were stayed by any of the provisions of Tamil Nadu Act 40 of 1978.

7. From the aforesaid conspectus of the provisions, it is obvious that the basis of relief afforded in indebted agriculturist debtors under Tamil Nadu Acts 40 of 1978 and 40 of 1979 is different. While the provisions of Tamil Nadu Act 40 of 1978 enabled a creditor to recover only one-half of the debt due and one-half of the interest thereon and discharged statutorily the balance payable by and recoverable from the debtor, the provisions of Tamil Nadu ACt 40 of 1979 permitted the recovery of the principal and the interest not in excess of one-and-a-half times the principal. Even in cases to which provisions of Tamil Nadu Act 40 of 1978 applied and appropriate relief had been granted, Tamil Nadu Act 40 of 1979, by section 32, nullified the effect of such application of the provisions of Tamil Nadu Act 40 of 1978 by making inapplicable section 8 of the Tamil Nadu General Clauses Act and also by specifically providing under section 33 that any liability arising under any debt due from a debtor shall be deemed never to have been discharged under Tamil Nadu Act 40 of 1978, as if that Act was not passed. At the same time, it was also provided that such debt shall be scaled down in accordance with the provisions of Tamil Nadu Act 40 of 1979. The solitary exception to the non-applicability of the provisions of Tamil Nadu Act 40 of 1979 is to be found in section 33(2) of Tamil Nadu Act 40 of 1979 - that being a case, where the order passed had been executed or satisfied in full, before the date of publication of Tamil Nadu Act 40 of 1979 in the Tamil Nadu Government Gazette. It is thus seen that though under Tamil Nadu Act 40 of 1978 a particular scheme of scaling down and discharge had been provided, that had been totally abrogated, annulled and set at naught by the provisions of Tamil Nadu Act 40 of 1979. The statutory discharge with reference to one half of the principal and one half of the interest under section 7(1)(b) of Tamil Nadu Act 40 of 1978, has been declared to be of no avail under sections 31, 32 (1) and (3) and 33(1) of Tamil Nadu Act 40 of 1979 and it has been specifically provided under section 32(1) and (3) that the proceedings taken or liability incurred would not be preserved despite the repeal of Tamil Nadu Act 40 of 1978 by Tamil Nadu Act 40 of 1979 and that legal proceedings and remedies with reference to rights, privileges, obligations or liabilities acquired, accrued or incurred under Tamil Nadu Act 40 of 1978 shall not be instituted, continued or enforced under that Act,namely, Tamil Nadu Act 40 of 1978. Thus, it is clear from sections 7(1) and (2), 8 and 31 to 34 of Tamil Nadu Act 40 of 1979 that excepting a case falling under section 33(2) of Tamil Nadu Act 40 of 1979, the earlier proceedings taken under Tamil Nadu Act 40 of 1979, would all abate and to every debt, the scaling down provisions in Tamil Nadu Act 40 of 1979 has to be applied. It has earlier been noticed in this case that the respondent had obtained decrees in O.S.Nos.1910 and 1909 of 1978 in accordance with the provisions of Tamil Nadu Act 40 of 1978 and the decrees had remained unexecuted or not satisfied.In such a situation, applying the aforesaid provisions of

Tamil Nadu Act 40 of 1979, particularly sections 31 to 34, with reference to the debts recoverable from the petitioner by the respondent on the basis of the promissory notes referred to earlier, the respondent was entitled to recover one-and-a-half times the amount of principal, whether by way of principal or interest or both under section 8(1) of Tamil Nadu Act 40 of 1979. It is not the case of the petitioner that by the institution of O.S.Nos.2627 and 2626 of 1981, the respondent was attempting to recover amounts from the petitioner in excess of what has been provided for under section 8(1) of Tamil Nadu Act 40 of 1979. The limited objection of the petitioner was that a second suit for the recovery of further amounts towards principal and the interest under the promissory notes would not lie. The inability of the respondent to recover the entire amount on the promissory notes under the provisions of Tamil Nadu Act 40 of 1978 was not on account of any fault of the respondent. However, with reference to the liability of the petitioner arising on the promissory notes sued upon in O.S.Nos.1910 and 1909 of 1978, full satisfaction thereof was provided statutorily by granting a decree with reference to one-half of the principal and one-half of the interest and by deeming the balance discharged or wiped out, which was subsequently annulled by the provisions of Tamil Nadu Act 40 of 1979. The statutory discharge or wiping out of one-half of the principal and one-half of the interest provided for under section 7(1)(b) of Tamil Nadu Act 40 of 1978 was removed or erased by the provisions of Tamil Nadu Act 40 of 1973. Particularly, section 23(1) of Tamil Nadu Act 40 of 1979 made provision for the revival or restoration of the liability deemed to have been discharged under the provisions of Tamil Nadu Act 40 of 1978, as if that Act (Tamil Nadu Act 40 of 1978) was not passed. That would seen that the deemed discharge provided for under section 7(1)(b) of Tamil Nadu Act 40 of 1979 should be deemed never to have taken place at all. That in turn should revive the right to recover one-half of the principal and one-half of the interest thereon deemed to have been discharged under section 7(1)(b) of Tamil Nadu Act 40 of 1978. That such a revived or restored right could also be enforced by excluding the time between 15-1-1976 and ending with the date of publication of Tamil Nadu Act 40 of 1979 in the Tamil Nadu Government Gazette is clearly established by section 34(i) of Tamil Nadu Act 40 of 1979. Thus, a consideration of the provisions of Tamil Nadu Acts 40 of 1978 and 40 of 1979 clearly establishes that the deemed discharge of the liability in respect of one-half of the principal and one-half of the interest under the provisions of Tamil Nadu Act 40 of 1978, was not preserved under Tamil Nadu Act 40 of 1979, but, on the contrary, the discharge of liability under the provisions of Tamil Nadu Act 40 of 1978 was wiped out, as if Tamil Nadu Act 40 of 1978 had not been passed. The right to recover the entire amount due to the creditor was made available to him, subject to the provisions of sections 7 and 8 of Tamil Nadu Act 40 of 1979 and the right of action was also saved from the bar of limitation. The statutory deemed discharge under Tamil Nadu Act 40 of 1978 having been statutorily undone by the provisions of Tamil Nadu Act 40 of 1979, whatever rights were originally available to the creditor were restored to him protected from the bar of limitation to be enforced within the framework of Tamil Nadu Act 40 of 1979.

8. It now remains to consider only two related aspects with reference to sections 8 and 16 of Tamil Nadu Act 40 of 1979. Section 8(3) at first blush would appear to suggest that the debtor ought not to be saddled with liability in any sum, in excess of the amount, which would have been payable by him, if Tamil Nadu Act 40 of 1979 had not been passed. That provision, in my view, cannot be so read as to preserve the rights of a debtor under Tamil Nadu Act 40 of 1978, for, that would plainly conflict with sections 32(1) and 33(1) of Tamil Nadu Act 40 of 1979. All that section 8(3) provides for is that by reason of the application of section 8(1) and (2) of Tamil Nadu Act 40 of

1979, the liability of a debtor cannot be increased, in excess of the amount that would have been payable by him, if the provisions of Tamil Nadu Act 40 of 1979 were not there. To put differently, this provision simply means that if the liability of a debtor was less than one-and-a-half times the amount of principal, whether by way of principal or interest or both, section 8(1) or (2) cannot be so applied as to impose a further liability on the debtor upto the limit of one-and-a-half times the amount of principal. Therefore, section 8(3) of Tamil Nadu Act of 1979 also cannot be put against the respondent. The only other provision which may be considered to be applicable on the facts of this case is section 16 of Tamil Nadu Act 40 of 1979, which provides for amendment of decrees. That section presupposes the Court having passed a decree for the repayment of a debt, in which event, on an application by judgment-debtor or others mentioned therein within six months from the date of publication of Tamil Nadu Act 40 of 1979 in the Tamil Nadu Government Gazette, the decree can be scaled down and amended according to the provisions of Tamil Nadu Act 40 of 1979. In this case, there was no decree at all with reference to one-half of the principal amount and one-half of the interest in the suits O.S.Nos.1910 and 1909 of 1978, because of the statutory discharge under section 7(1)(b) of Tamil Nadu Act 40 of 1978, as it then stood. Therefore, in the absence of any decree passed by the court with reference to one-half of the claim towards principal and the one-half of the interest, section 16 of Tamil Nadu Act 40 of 1979 cannot be held applicable to the respondent.

9. With reference to the claim made in O.S.Nos.1910 and 1909 of 1978 and the decrees passed therein, the position was that there was satisfaction of the liability of the petitioner to the respondent by statutorily providing for a discharge of half the liability on the principal and interest and by granting a decree in respect of the other half of the principal and interest. The result was full and complete satisfaction, partly statutory and partly through court process, to the creditor. The very bottom of the satisfaction thus afforded to the creditor by the partial statutory discharge of the debt was knocked out by the provisions of Tamil Nadu Act 40 of 1979, which had the effect in law of restoring the respondent to the position which he occupied prior to the application of the provisions of Tamil Nadu Act 40 of 1978. In such an event, on the annulment of the statutory discharge, the respondent's right to recover even that porition of the debt was restored and as already seen, that claim was also saved from the bar of limitation under section 34 of Tamil Nadu Act 40 of 1979. Indeed, in *MUTHUVEERAPPA CHETTY v. ADAIKAPPA CHETTY*, (1920) I.L.R.43 Mad.845: 39 M.L.J.312= 12 LW 240 it was held that the subsequent annulment or deprivation of satisfaction by payment by a decree of court would give the creditor a fresh cause of action against the debtor and time also began to run from the date of annulment. In the case on hand, the annulment of satisfaction has been brought about by statute, namely, the provisions of Tamil Nadu Act 40 of 1979. During the period when the provisions of Tamil Nadu Act 40 of 1978 were in force, the respondent could not have sued for the recovery of the entire amount, because, the statute, in the shape of sections 6 and 7 of Tamil Nadu Act 40 of 1978, stood in his way and statutorily discharged a part of the debt. That was removed only by the provisions of Tamil Nadu Act 40 of 1979 by annulling the statutory discharge with reference to a part of the debt. That charge rendered the debtor liable for the repayment of the entire amount, subject of course to the provisions of Tamil Nadu Act 40 of 1979. Looked at from the point of view of the provisions of Tamil Nadu Acts 40 of 1978 and 40 of 1979, the right to recover one-half of the principal and one-half of the interest thereon was restored to the respondent by the provisions of Tamil Nadu Act 40 of 1979 and that claim was also preserved intact against the bar of limitation under section 34 of Tamil Nadu Act 40 of 1979 so that right could

be enforced without in any manner being affected by the provisions of Tamil Nadu Act 40 of 1978. Precisely, that was done by the respondent by instituting the suits in O.S.Nos.2627 and 2626 of 1981. No exception can, therefore, be taken to the maintainability of the suits by the respondent. The first contention of the learned counsel for the petitioner cannot, therefore, be accepted.

10. The learned counsel for the petitioner next contended that the suits instituted by the respondent for the recovery of the further amounts due from the petitioner would be hit by the provisions of Order 2, rule 2, Code of Civil Procedure, and, therefore, the respondent cannot sue for relief with reference to the portion of the claim. On the other hand, the learned counsel for the respondent would point out that having regard to the provisions of Tamil Nadu Act 40 of 1978, as they then stood, the respondent was not entitled to include the whole of the claim in his suit and there was no intentional relinquishment or omission to sue on the part of the respondent so as to disentitle him from recovering it subsequently on the coming into force of the provisions of Tamil Nadu Act 40 of 1979. No doubt, under Order 2, rule 2, Code of Civll Procedure, normally, every suit should include the entirety of the claim, which a plaintiff is entitled to make in respect of a cause of action. The plaintiff may also relinquish a portion of his claim with a view to bring the suit within the jurisdiction of the court. But, where a plaintiff omits to sue or intentionally relinquishes any portion of his claim, he will be thereafter precluded from suing in respect of the portion so omitted or relinquished. Likewise, a person entited to more than one relief with reference to a cause of action, may sue for all or any of such reliefs, but if he omits without leave of court to sue for all such reliefs, he shall not afterwards be permitted to sue for the relief so omitted. At the time when the suits in O.S.Nos.1910 and 1909 of 1978 were instituted, the respondent was not entitled to claim the whole of the amount from the petitioner because the provisions of Tamil Nadu Act 40 of 1978 did not permit it. He was, therefore, not entitled to include the shole of the claim. Equally, there was no volitional omission on the part of the respondent to sue for one-half of the amount and there was no intentional relinquishment either. As per the provisions of Tamil Nadu Act 40 of 1978, all that the respondent was entitled to recover formed the subject-matter of the suits O.S.Nos.1910 of 1909 of 1978 and, therefore, it was not a case where the respondent was entitled to claim something more, but had actually claimed much less or had otherwise omitted to sue or even intentionally relinquished a portion of the claim attracting the provisions of Order 2, rule 2, Code of Civil Procedure. It may not be out of place to point out that the right in respect of which relief was prayed for by the respondent in O.S.Nos.2627 and 2626 of 1981 did not exist at the time of the institution of O.S.Nos.1910 and 1909 of 1978. Under these circumstances, there is no question of the bar under Order 2, rule 2, Code of Civil Procedure operating against the respondent.

11. Lastly, the learned counsel for the petitioner contended that the suits were barred by limitation as the petitioner was an assessee under the Tamil Nadu Agricultural Income-tax Act, and therefore, the benefit of the extended period of limitation cannot be availed of by the respondent. It is not in dispute that if the petitioner was not an assessee under the Tamil Nadu Agricultural Income-tax Act, then he would be entitled to the benefits of Tamil Nadu Act 40 of 1979 so as to enable the respondent to take advantage of section 34 thereof providing for exclusion of time for filing of suits as proved thereunder. No evidence at all had been placed by the petitioner in support of his claim that he is an assessee assessed to agricultural Income-tax under the provisions of the Tamil Nadu Agricultural Income-tax Act. Indeed, in the course of the prior suits O.S.Nos.1910 and 1909 of 1978, the petitioner accepted the position that

he was an agriculturist entitled to the benefits of the Tamil Nadu Ordinance V of 1978, subsequently replaced by Tamil Nadu Act 40 of 1978 and no dispute was ever raised by the petitioner that he was not an agriculturist. Even in the course of the proceedings before the court below, apart from merely pleading that he was not an agriculturist, the petitioner did not place any evidence in support of such a plea. In the absence, therefore, of any material to substantiate his claim that the petitioner is an assessee under the provisions of the Tamil Nadu Agricultural Income-tax Act, he cannot be heard to contend that he is not a debtor within the meaning of the provisions of Tamil Nadu Act 40 of 1979 and, therefore, the claim against the petitioner would be barred by limitation. There is no dispute that if the petitioner is not established to be an assessee under the Tamil Nadu Agricultural Income-tax Act, then the respondent is entitled to claim the benefit of the extended period of limitation taking into account the provisions of Tamil Nadu Acts 10 of 1975, 40 of 1978 and section 34 of Tamil Nadu Act 40 of 1979, in which event, the suits instituted on 18.11.1981, would be doubtless well within time. Thus, the plea that the suits are barred has absolutely no substance. No other point was urged. Consequently, the Civil Revision petitions fail and are dismissed with costs. One set.

R.S. ----- *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

Present:- *S.Natarajan, J.*,

*W.P.No.7512 of 1984. 31*st July*, 1984.

J. Ramamoorthy, Partner, M/s. J.Ramamoorthy and Ramalingam Brothers, Madras. *Petitioner**

v.

Corporation of Madras, represented by the Commr. Park-Town, Madras-3 and others *Respondents.*

Madras City Municipal Corporation Act (Tamil Nadu Act IV of 1919), section 285(1) - Corporation of Madras, levying charges for parking vehicles in the parking lots - Whether illegal.

On the question whether the Corporation of Madras can levy charges for parking of vehicles in the parking lots and that too, at the rates now prescribed by the Corporation for parking of four wheelers, three wheelers and two wheelers,

Held:- Under section 285(1) of the Madras City Municipal Corporation Act (Tamil Nadu Act IV of 1919), the Commissioner of a Corporation can construct or provide public landing places, halting-places, cart-stands, cattle-stands and cow-houses and may charge and levy such fees for the use of the same as the Standing Committee may fix. The Explanation to the sub-section states that a cart stand shall, for the purposes of the Act, include a stand for carriages including motor vehicles within the meaning of the Motor Vehicles Act, 1939 and animals. Thus, it is open to the Corporation to construct or provide halting places for parking of four wheelers, three wheelers and two wheelers and also levy such fees for the use of the same as the Standing Committee may fix. In fact, it is even open to the Commissioner, under sub-section (3) of section 285, to farm out

the collection of such fees for any period not exceeding three years at a time, on such terms and conditions as he may think fit. Under the City Munici-pal Corporation Act, all public streets, pavements and appurtenances vest in the Corporation. Therefore the Corporation creates a parking lot and allows owners of vehicles to park their vehicles therein on payment of certain charges. The amount collected is not exclusively by way of fee for *quid pro quo* services rendered by the Corporation, but also by way of return for the user of its property. The collection of parking fee is by way of return for a vehicle owner making use of the parking lot and not for anything else. The Corporation is not in the position of an insurer when it collects a parking fee of Rs.1/- per hour for allowing a four wheeler or three wheeler or 50 paise per hour for a two wheeler to be parked in the parking lot. The Corporation is, there-fore, under no legal obligation to guarantee the safety of the vehicle left in the parking lot merely because of its collection of charges for parking.
[Paras.3 and 6]

Cases referred to:-

Arumugha Kone v. Palayamcottai Municipal Council, (1974)1 M.L.J.258;*Market Vyaba-rigal Sangam v. Municipal Council*, (1974) 87 L.W.697; *Narayana Iyer v. Uni-on of India*, (1977)1 M.L.J. (S.C.) 41= (1977)1 S.C.J.193= (1976) S.C.R. (Supp) 486= (1976)3 S.C.C.428= A.I.R.1976 S.C.1986.

Petition under Article 226 of the Cons-titution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a Writ of Mandamus, forbearing the respondents from collecting the parking fee for parking of the vehicle of the petitioner bearing Registration Nos.TMV.2617, PYZ.5857 and TMP.9607 in the parking lots mentioned by the Madras Corporation in the City of Madras so far as the petitioner is concerned.

R.Mohan and G.Venkata Raju, for Peti-tioner.

The Court made the following

ORDER:- Can the Corporation of Madras levy charges for parking of vehicles in the parking lots, and that too, at the rates now prescribed by the Corpora-tion for parking of four wheelers, three wheelers and two wheelers? According to the petitioner, the Corporation cannot levy charges and even if it can, the charges presribed are arbitrary and unreasonable. Hence the petitioner has filed this petition for the issue of a writ of mandamus to make the Corpo-ration of Madras (the first respondent herein) forbear from collecting parking fee in respect of his vehicles whenever they are parked in the parking lots set apart by the first respondent.

2. The petitioner's case, as contained in the affidavit sworn to by him, is to the following effect: The petitioner is a businessman and has his place of business in Godown Street, Madras-1. In connection with his business he is owning three cars. It has been his practice to go to his place of business every morning by car and then keep the vehicle parked in the traffic island behind the Flower Bazaar Police Station from morning till evening. The parking of cars in that area does not cause any obstruction to the traffic passing along N.S.C.Bose Road. The Corporation had not been collecting hitherto any parking fee from owners of motor vehicles for the parking of their cars in the parking lots. However, for the first time, the Corporation introduced a system of priced parking in the city from 16.7.1984. It has notified certain areas as parking lots and one of the areas so notified is the traffic island behind the Flower Bazaar Police Station. As per the notification, there will be a levy of parking fee for parking of vehicles between 7 a.m. and 9 p.m. on all days except Sundays, in the parking lots. A fee of Rs.1/- per hour has been prescribed for four wheelers and three wheelers subject to a maximum of Rs.10/- per day and a fee of 50 paise per hour has been prescribed for two wheelers subject to a maximum of Rs.5/- per day. In addition to the payment of parking fee, it is also incumbent

upon the owner or driver of the vehicle to assess the period of parking of the vehicle and obtain a ticket from the parking attendant at the time of parking. Before the expiry of exit time punched in the ticket the vehicle should be removed from the parking lot, failing which penalty of Rs.2/- per hour or part thereof has to be paid for four wheelers and three wheelers and a penalty of Rs.1/- per hour or part thereof has to be paid for the two wheelers, for the excess period. In spite of the collection of parking fee, the Corporation does not hold itself liable for any theft or damage caused to the vehicle during the time it is parked in the parking lot. It is the case of the petitioner that the levy of parking fee is illegal, arbitrary and without jurisdiction. No special benefit or privilege is conferred on the owners of vehicles in return for the collection of parking fee. There are no guidelines on the basis of which the fee has been fixed and, further more, there is no correlation between the fee collected and the services rendered. On account of these factors the petitioner would say that the levy of parking fee is illegal and hence the Corporation must be restrained by means of a writ of mandamus from collecting parking fee in respect of his vehicles.

3. On an examination of the matter, I find that the contentions of the petitioner are not sustainable other in law or on grounds of public policy. Under section 285(1) of the Madras City Municipal Corporation Act (Tamil Nadu Act IV of 1919), the Commissioner of a Corporation can construct or provide public landing places, halting places, cart stands, cattle sheds and cow houses and may charge and levy such fees for the use of the same as the Standing Committee may fix. The Explanation to the sub-section states that a cart stand shall, for the purposes of the Act, include a stand for carriages including motor vehicles within the meaning of the Motor Vehicles Act, 1939 and animals. It may therefore be seen that it is open to the Corporation to construct or provide halting places for parking of four wheelers, three wheelers and two wheelers and also levy such fees for the use of the same as the Standing Committee may fix. In fact, it is even open to the Commissioner, under sub-section (3) of section 285, to farm out the collection of such fees for any period not exceding three years at a time, on such terms and conditions as he may think fit. The petitioner is not aggrieved with the setting apart of parking lots by the Corporation, but is only aggrieved about the collection of parking fee. According to him, the parking of vehicles should be allowed free of charges as had been done hitherto and if that is not possible, the charges ought be nominal and commensurate with the services rendered by the Corporation by way of *quid pro quo* for the collection of parking charges.

4. Before considering the legal aspect of the petitioner's contention, it has to be pointed out that even on grounds of public policy, his contention cannot be accepted. In big cities like Madras, there are only a few parking lots available and those parking lots have to serve the needs of a large number of persons owning vehicles. The limited space available in the parking lots has to be shared in a fair and reasonable manner among all the owners of vehicles in need of parking space and the parking lots cannot be monopolised by a few persons alone and that too, without paying charges. If about twenty or thirty persons like the petitioner who have their business premises near the Flower Bazaar Police Station, park their motor cars and other vehicles in the parking lot from morning till evening, the others would stand completely deprived of the use of the parking lot even if their requirement of the parking lot is only for half an hour or one hour. One of the effective methods by which a monopolistic use of a parking lot by a few car owners can be prevented is, by introduction of a system of collecting parking charges. By reason of the introduction of this system, the car owners will stop treating the parking lot as their

private garages and keeping their vehicles parked from morning till night. Once they make a restricted use of the parking lot, then it goes without saying that other persons owning vehicles can also have the facility of the parking lot for parking their vehicles for limited durations.

5 Coming, now, to the legal aspect of the petitioner's contention, I have already pointed out that under the statute the Corporation has got the requisite power to provide halting places or parking places for motor vehicles. The argument that the parking fee that has been prescribed is not on the basis of any guidelines, but is arbitrary, is not tenable. It is, no doubt, true that no guidelines have been prescribed. But, under the Act, the Standing Committee has been empowered to prescribe the scale of fees, that may be collected for landing places, halting places, cart stand etc. As there is no Standing Committee functioning at present and since the Special Officer and the Commissioner of the Corporation are empowered to administer the Corporation, it is well within their power to fix the rates of fee for user of the parking lots. The rate of levy of Rs.1/- for four wheelers, and three wheelers and 50 paise for two wheelers for every hour of parking, and the levy of double the rates for unauthorised user of the parking let for every hour of such user can, by no stretch of imagination, be said to be excessive. When advancing an argument that the levy is on the high side, the petitioner should also take into consideration the cost of petrol and deisel and the additional expenses he would have to incur if the Corporation fails to provide parking lots at important places and forces the vehicle-owners to drive off their vehicles to distant places in search of parking space. The levy of parking fee at slab rates, is a well known system throughout the world. The additional levy made for overstay of the vehicles in the parking lot is also intended to prevent monopolistic use of the parking space by a few owners of vehicles. Besides, the collection of parking charges at enhanced rates for periods of overstay, will make people conscious of time and instil in them a sense of value of time and is therefore an additional reason for justifying the system.

6. With reference to the argument that the collection of parking fee should be on *quid pro quo* basis and that the services rendered by the Corporation on return is grossly disproportionate to the amount of fee collected, the fallacy in the contention is two-fold. In the first place, the levy of parking fee cannot be construed as a fee in the limited sense of being *quid pro quo* charges for the services rendered by the Corporation to the owner of a vehicle or a taxi, but it is a return or fee or consideration for the permission granted by the owner of a property to a third-party to make use of the said property. Under the City Municipal Corporation Act, all public streets, pavements and appurtenances vest in the Corporation. Therefore, when the Corporation creates a parking lot and allows owners of vehicles to park their vehicles therein on payment of certain charges, the amount collected is not exclusively by way of fee for *quid pro quo* services rendered by the Corporation, but also by way of return for the user of its property. The law on the subject has been succinctly laid down by the Division Benches of this Court, to both of which I was a party. Vide: *ARUMUGHA KONE v. PALAYAMCOTTAI MUNICIPAL COUNCIL*, (1974)1 M.L.J.258 and *MARKET VYABARIGAL SANGAM, COIMBATORE v. MUNICIPAL COUNCIL, COIMBATORE*, (1974) 87 L.W.697. In these cases, the question was whether a Municipality was entitled to collect increased fees for the use of the stalls or shops built by it and let out to persons for running their business. While answering the question in the affirmative, it was pointed out as follows:-

"The fee or the levy or the impost made under section 260(2) of the Tamil Nadu District Municipalities Act, has a peculiar characteristic in that it is collection made by virtue of

the powers in a statute, and incidentlly, it is a necessary power annexed to ownership of properties vested in the owners".

Hence the argument that the levy of parking charges should boar relation to the services rendered in return by the Corporation is not legally sustainable.

7. I may also dispose of another contention at this juncture, viz. that the Corporation does not take the responsbility of safeguarding the vehicles from loss or theft in spite of collecting parking fee. The collection of parking fee is by way of return for a vehicle owner making use of the parking lot and not for anything else. The Corporation is not in the position of an insurer when it collects a parking fee of Rs.1/- per hour for allowing a four wheeler or three wheeler or 50 paise per hour for a two wheeler to be parked in the parking lot. The Corporation is, therefore, under no legal obligation to guarantee the safety of the vehicle left in the parking lot merely because of its collection of charges for parking.

8. Lastly, I may refer to a decision of the Supreme Court in *NARAYAN IYER v. UNION OF INDIA*, (1977)1 S.C.J.193: (1977)1 M.L.J. (S.C.) 41= (1976) S.C.R. (Supp) 486= (1976)3 S.C.C.428= A.I.R.1976 S.C.1986. That was a case filed to challenge the revision of tariff rates by the Telephones Department. Under the Indian Telegraph Amendment Rules, 1966, the rental and call charges were increased by 50 per cent and trunk call charges by about 30 to 35 per cent. This was challenged on the ground that the Telephone system is a public utility service and not a revenue earning establishment and the charges can be only in the nature of a fee which must be commensurate with the cost of rendering the service. The Supreme Court rejected the contention on three grounds, but, for our purpose, it is enough the first ground alone is referred to. The Supreme Court held that no one is a compelled to subscribe to a telephone and therefore, if a subscriber to a telephone enters into a contract with the State, he has to pay the rates charged by the State, for installation. The same ratio will apply here also. No case is compelling the petitioner to park his vehicle in the parking lot. It is left to him to take his vehicle elsewhere and park it. But, if he wants to make use of the parking lot, he has to abide by the conditions imposed by the Corporation. In all such matters, the benefit sought to be conferred on the public should have prevalence over personal considerations and personal advantages.

9. For all the aforesaid reasons, the petition deserves to fail and will accordingly stand dismissed.

R.S. ----- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *V.Ratnam, J.*

*C.R.P.No.428 of 1984. 8*th January*,1985.

H.V.Panchapagesan *Petitioner**

v.

K.Swaminathan *Respondent.*

(A) Civil Procedure Code (V of 1908), section 11 - Principles of res judicata - Applicability - Erroneous decision by Court on mixed question of law and fact - Binding character of the decision in subsequent proceedings inter-partes.

(B) Tamil Nadu City Tenants' Protection Act (V of 1908), section 9 - Fixation of price of the demarcated area of land sold to tenant - Subsequent decision laying down different principles for determining the price - Whether hit by the principles of res judicata.

In a suit for ejectment the defendant claimed the benefit of section 9 of the Tamil Nadu City Tenants' Protection Act. The Commissioner appointed to determine the minimum extent of land to he conveyed to the tenant fixed the area and demarcated the same. The plaintiff applied for delivery of the remaining portion and obtained delivery. The defendant applied for directing the plaintiff to execute a sale deed conveying the demarcated area to him at the price fixed by the Court in C.R.P.2954/74 on 6th August, 1975 which had questioned the determination as to the extent of the land required by the defendant as well as the price fixed by the lower appellate Court. Thereupon the plaintiff applied to the Court for re-fixation of the price in the light of a subsequent decision of the High Court in *ARASAN CHETTIAR v. NARASIMHULU*, (1980)2 M.L.J.303 rendered on 5.2.1980.

Held:- In considering the question of *res judicata*, the court is not concerned with the correctness or otherwise of the judgment rendered earlier. A finding rendered on a fact in issue by a competent court in earlier proceedings should be regarded as having been finally decided in a subsequent litigation raising the same issue between the same parties. Even if a mixed question of fact and law had been determined between the same parties, that may not also be questioned in the subsequent proceedings. Where the decision is on a question of law, namely, interpretation of a statute, that would also operate as *res judicata* in a subsequent proceeding between the same parties where the cause of action is also the same. In this case, the extent of the land as well as its price were the subject-matter of the earlier proceedings and the courts which decided those questions had jurisdiction to decide them. The questions decided were essentially factual. Even on the basis that something turned upon the interpretation of the words, "the date of the order", the questions decided earlier by the courts would be mixed questions of law and fact. *[Para.4]*

Such a mixed question of law and fact determined in the earlier proceedings between the same parties may not, for the reason that it had been decided in an earlier proceeding, again be questioned. A final binding adjudication inter-partes on a mixed question of fact as well as law, will not in any manner be affected by any subsequent decision not accepting the principle laid down in the former decision. (Vide *Sadhu Charan v. H.Naik*, A.I.R.1964 Ori. 121. The correctness or otherwise of a decision viewed in the light of a subsequent decision has really no bearing upon the question whether it would operate as *res judicata* or not. All that is necessary to be established is that the matter was directly and substantially in issue in the former proceeding and that it had also been heard and finally decided. If the binding character of a decision is made to fluctuate with every change in the current of authority, the court machinery would be reduced to one for unsettling the rights rather than giving effect to rights already ascertained. Under those circumstances the lower appellate court was right in its conclusion that the prior adjudication in C.R.P.No.2954 of 1974 operated as *res judicata* and would preclude the petitioner from contending that a re-determination or re-fixation of the price should be made contrary to the earlier adjudication. *[Para.4]*

Cases referred to:-

Panchapakesan v. Swaminathan, (1976)1 M.L.J.338: A.I.R.1976 Mad.254; *Arasam Chettiar v. Narasimhulu Naidu's Estate Trust*, (1980)2 M.L.J.303: I.L.R. (1980)3 Mad.13: A.I.R.1980 Mad.305; *New Theatres (Carnatic Talkies) Ltd. v. N.Vajrapani*, (1984)1 R.C.J.91: A.I.R.1984 S.C.1; *Jai Singh Jairam Tyagi v. Mama Chand, (1980)2 S.C.J.100: (1980)3 S.C.C.162*: (1980)2 R.C.J.159: A.I.R.1980 S.C.1201; *Sadhu Charan v. H.Naik*, A.I.R. 1964 Ori.121; *Mathura Prasad Sarjoo Jaiswal v. Dossibai N.B. Jeejebhoy*, (1970)2 S.C.J.685: (1970) R.C.J.1091: (1970)3 S.C.R.830: A.I.R.1971 S.C.2355.

Petition under section 115 of Act V of 1908, praying the High Court to

revise the order of the City Civil Court, (IX Addl.) Madras, dated 8.8.1983 and made in C.M.A.No.238/82 I.A.No.3952 of 1982 in O.S.No.1382 of 1962 City Civil Court (IV Asst.) Madras.

K.N.Balasubramanian, for Miss.K.Kusam Kumari, for Petitioner.

S.Parthasarathy for M/s. P.V.Bakthavatsalam and P.Gunaraj, for Respondent.

The Court made the following

ORDER:- The plaintiff in O.S.No.1382 of 1962 on the file of the IV Assistant Judge, City Civil Court, Madras, is the petitioner in the Civil Revision Petition. The property in dispute bears door No.12, Doraisami Road, Madras.17. In O.S.No.1382 of 1962, the petitioner prayed for a decree in ejectment against the respondent herein on the ground that he was only a licensee and that the licence in his favour had also been duly terminated. In the course of that suit, the respondent herein put forth the claim that he was a lessee and that he was also entitled to the benefits of section 9 of the Tamil Nadu City Tenants' Protection Act (hereinafter referred to as 'the Act'). Consistent with the claim so made, the respondent herein filed I.A.No.2553 of 1962 claiming that he is entitled to purchase the site under section 9 of the Act for the value to be fixed by Court. On 28.9.1964, the learned IV Assistant Judge, City Civil Court, Madras negatived the claim of the respondent that he is a lessee in possession entitled to the benefits of the Act and accepting the case of the petitioner, granted a decree for recovery of possession against the respondent. Consequent to the finding arrived at in the suit, the application filed by the respondent under section 9 of the Act stood dismissed. Aggrieved by the decree granted in favour of the petitioner herein in O.S.No.1382 of 1962 and the dismissal of the application in I.A.No.2553 of 1962, the respondent herein preferred an appeal in A.S.No.324 of 1964 and O.M.A.No.61 of 1964 respectively to the Additional Judge, City Civil Court, Madras. By judgment dated 24.3.1965, both the appeals were allowed on the finding that the transaction under which the respondent came into possession of the property was a lease and that he would be entitled to the benefits of section 9 of the Act and the suit as well as the application were remitted to the trial Court for fresh disposal in the light of the observations contained in the judgment. A direction was given that the minimum extent of land should first be determined and then the price thereof should be ascertained and the manner of payment of the price should also be indicated. Against the remit orders in A.S.No.324 of 1964 and C.M.A.No.81 of 1964, the petitioner preferred C.M.A.No.165 of 1965 and C.R.P.No.1885 of 1965 respectively to this Court and by judgment dated 11.2.1971, the remit order was upheld on the view that the transaction was a lease and that the benefits of the provisions of the Act could be invoked by the respondent. When the matter went back, the respondent herein filed I.A.No.12772 of 1971 for the appointment of a Commissioner to determine the minimum extent as well as the price. After holding an enquiry, it was reported by the Advocate-Commissioner that the entire extent under the occupation of the respondent, namely, 2,381 square feet would be necessary for his convenient enjoyment and that the price thereof has to fixed at Rs.18,000/- per ground, taking into account the price during the period of three years prior to 15.3.1971, on which date the Commissioner was appointed, which date, according to the Commissioner, was the relevant date for the determination of the value. When the matter came up again before Court for a consideration of the extent as well as the price, on 29.4.1972, the learned IV Assistant Judge, City Civil Court, Madras, accepted the conclusion of the Commissioner that the respondent requires the entire extent under his occupation, namely, 2,381 square feet for his convenient enjoyment. However, considering the basis for the fixation of the price adopted by the Commissioner, the learned Judge found that

three years immediately preceding the date of the order can only relate to the date 24.3.1965, when it was decided that the respondent was entitled to the benefits of the Act and that taking that into account, the value can be fixed at Rs.10,000/- per ground for the area of 2,381 square feet leased out to the respondent he should pay Rs.9,920/-. A direction was also given that the respondent should pay that amount within four months from 29.4.1972. The respondent deposited a sum of Rs.10,050/- into Court on 26.8.1972. Against the fixation of the extent and the determination of the price so made, the petitioner herein preferred A.S.No.230 of 1972 before the First Additional Judge, City Civil Court, Madras. By judgment dated 29.12.1973, the appeal was dismissed, confirming the order dated 29.4.1972 passed in I.A.No.12772 of 1971 to the effect that the entire extent of 2,381 square feet would be required for the convenient enjoyment of the respondent and fixing the price thereof at Rs.10,000/- per ground. Thereupon, the petitioner preferred C.R.P.2954 of 1974 before this Court questioning the correctness of the determination of the extent of the land as well as its price. On 6.8.1975, Ramaprasada Rao, J. (as he then was) allowed the Civil Revision Petition in part holding that the minimum extent of the land required by the respondent would be of an extent of 48 feet on the road side with the north-south depth upto the limit of the bath-room show in the sketch and a line from east to west in continuation thereof as indicated in the sketch which was made part of the record and that extent should be sold by the petitioner to the respondent at the price fixed by the Courts below. The judgment so rendered in reported by *Panchapagesan v. Swaminathan*, (1976)1 M.L.J.338: A.I.R.1976 Mad.254. The respondent herein filed a Special Leave Petition in S.L.P.No.508 of 1976 before the Supreme Court seeking its interference to hold that the entire extent of 2,381 square feet was the minimum extent required for the convenient enjoyment of the respondent. However, by order dated 20-2-1976, the Supreme Court dismissed that application. Thereafter, the petitioner filed in I.A.No.1995 of 1977 in O.S.No.1382 of 1962 for demarcation of the area as per the order of this Court in C.R.P.No.2954 of 1974 and though it was opposed by the respondent, by an order dated 11.1.1979 the application was allowed and the area was demarcated as APOR. Thereupon, the petitioner filed R.P.No.2733 of 1973, praying for the delivery of possession of the area not subject to the provisions of the Act and by an order dated 16.7.1980, the respondent was directed to deliver to the petitioner possession of the area which the petitioner was not obliged to convey to the respondent and the petitioner also took delivery of that portion on 22.4.1982. Against that order for delivery of excess land, the respondent herein filed C.R.P. No.2115 of 1980, which was dismissed by me on 26.9.1980. Against the order demarcating the area as directed by this Court in C.R.P.No.2954 of 1974, the respondent therein preferred C.R.P. No.2910 of 1980, and that was also dismissed by me on 10.4.1981. Despite these proceedings, the respondent did not succeed in obtaining a conveyance of the demarcated portion as per the order of this Court in C.R.P.No.2954 of 1974. Therefore, the respondent filed I.A.No.3952 of 1982 requesting the Court to direct the petitioner herein to execute a sale deed in his favour in respect of the extent demarcated as APOR. Meanwhile, on 5.2.1980, a Division Bench of this Court, interpreting the scope and applicability of section 9 of the Act, laid down that the Court must first decide the extent of the land necessary for the convenient enjoyment of the tenant and after having so determined the extent of the land, the court shall proceed to fix the price of the land and this decision is reported in *Arasan Chettiar v. Narasimhulu Naidu's Estate Trust*, (1980)II M.L.J. 303: I.L.R. (1980)3 Mad.13: A.I.R.1980 Mad.305. Encouraged by this decision, the petitioner raised the objection that the final determination of the demarcated area was done in the court in I.A.No.1995 of 1977 on 11.1.1979 and the market value has to be re-determined on the basis of the prevailing

price in 1979 and that the deposit made by the respondent on the basis of the prior fixation of the price had no relevance. The learned IV Assistant Judge, City Civil Court, Madras, took the view that the relevant date for determining the price of land should be taken as 6.8.1975, when C.R.P.No.2954 of 1974 was disposed of and, therefore, there should be a re-determination of the price of the land in view of the decision in *Arasan Chettiar v. Narasimhulu Naidu's Estate Trust*, (1980) 2 M.L.J. 303 . A finding was also rendered to the effect that the earlier decision of this court in *Panchapsgesan v. Swaminathan*, (1976)I M.L.J.338 will not separate as *res judicata*. On these conclusions, the application filed by the respondent herein, was dismissed. Aggrieved by this, the respondent herein preferred an appeal in C.M.A.No.238 of 1982 before the Second Additional Judge, City Civil Court, Madras. The petitioner herein filed a Memorandum of Cross-Objections contending that the material dates would be 20.2.1978, 10.4.1981 and 23.2.1982. The learned Second Additional Judge, City Civil Court, Madras, on a consideration of the scope and effect of the prior adjudications inter-partes, found that all the questions relating to the extent of the land as well as its price had been conclusively settled and adjudicated upon by the decision of this Court in C.R.P.No.2954 of 1974 and that the decision of the Division Bench in *Arasan Chettiar v. Narasimhulu Naidu's Estate Trust*, (1980) 2 M.L.J.303 would not affect the rights so determined. A finding was also given to the effect that the decision in C.R.P.No.2954 of 1974 will operate as *res judicata*. Finally, the learned Judge concluded that no ground had been made but for a re-assessment of the price of the land and that there is no necessity to substitute any other date as the relevant date of arriving at the value. In the result, the appeal was allowed and further steps were directed to be taken by the trial court for the execution of a conveyance by the petitioner in favour of the respondent with respect to the land APQR marked in the Commissioner's plan Exhibit C-1. It is the correctness of this order that is challenged in this Civil Revision Petition.

2. The learned counsel for the petitioner contended relying upon *Arasan Chettiar v. Narasimhulu Naidu's Estate Trust*, (1980) 2 M.L.J.303 , that the determination of the minimum extent of the land for convenient enjoyment has to be first done and only then, the Court will have jurisdiction to proceed to fix the price of the land and this method of dealing with an application under section 9 of the Act in the several stages indicated therein has also been approved of by the Supreme Court in *New Theatres (Carnatic Talkies) Ltd. v. N.Vajrapeni*, (1984)1 RCJ.91: A.I.R.1984 S.C.1 and, therefore, at the time when the court passed the order in C.R.P.No.2954 of 1974 determining both the extent of the land as well as its price, it had really no jurisdiction to fix the price and an erroneous decision of the court thus rendered with reference to the fixation of the price without jurisdiction cannot be deemed to have finally determined that question so as to operate as *res judicata*. Support for this was sought to be drawn from the decision in *Jai Singh Jairam Tyagi v. Manan Chand*, (1980)2 S.C.J.100: (1980)3 S.C. C.162: (1980)2 R.C.J.159: A.I.R.1950 S.C.1201. In answer to this contention, the learned counsel for the respondent submitted that it is not as if the Court had no jurisdiction at all to decide the questions regarding the extent as well as the prices, but that it had proceeded to exercise the jurisdiction, which it had, to adjudicate on those matters one after another, though by the same order, and that cannot be equated to a case of assumption of jurisdiction by a Court which it did not otherwise have and the exercise thereof, resulting in an erroneous decision, not operating as *res judicata*. The learned counsel also brought to the notice of the Court the decision in *Sadhu Charan v. H.Naik*, (A.I.R.1964 Orissa 1212) to contend that the principle of *res judicata* cannot in any manner be affected by any subsequent decision

rendered therefore, the petitioner cannot be heard to contend on the basis of the decision in *Arasan Chettiar v. Narasimhulu Naidu's Estate Trust*, (1980 2 M.L.J.303) that there was an exercise of jurisdiction by the Court while deciding the extent as well as the price, which it did not otherwise possess. Attention was also drawn by the learned counsel to *Muragesa Achari v. Chandra Bai and another*, (C.R.P.No. 1845 of 1966, dated 23.8.1968) to contend that though the drafting of section 9(1)(b) of the Act is not very happy, it would be impossible for a Court to construe the words, "the date of the order" as applying to an order to be passed by the Court fixing the price and determining the period within which the tenant must pay, as this date would be unknown to the parties when they lead evidence and would also be strictly a date only in future. It was, therefore, contended that "the date of the order" can have relevance only to the order under section 9(1)(a) of the Act holding that the tenant is entitled to the benefits of section 9 of the Act and viewed in that manner, no exception could be taken to the order passed by this court in C.R.P.No.2954 of 1974 fixing the minimum extent of the land and its price as well, as on 24.3.1965, when it was first held that the respondent was entitled to claim the benefits of the Act.

3. No doubt, there had earlier been some confusion regarding the interpretation and scope of section 9 of the Act. But the several stages and the manner in which such an application under section 9 of the Act has to be dealt with by Courts have been clearly indicated in the decision of the Devision Bench in *Arasan Chettiar v. Narasimhulu Naidu's Estate Trust*, (1980 II M.L.J.303). The first stage is to ascertain whether the application filed by a tenant under section 9 of the Act claiming benefits thereunder is maintainable. The second stage is reached after an affirmative decision in favour of the tenant is arrived at regarding the maintainability of the application claiming benefits under the Act as a tenant. In that stage, the court must decide upon the minimum extent of the land necessary for the convenient enjoyment of the tenant and that can be only by an order of court and that would be relvant date for the purpose of fixing the price mentioned in section 9(1)(b) of the Act. If such an order is challenged, "the date of the order" contemplated will be the date of the order of the appellate or revisional Court, as the case may be. Next comes the question of fixing the price of the land. Thereafter, the further stages, in which the application under section 9 of the Act has to be dealt with, follow. This method of dealing with or disposing of the application under section 9 of the Act, even according to the learned counsel for the petitioner has been accepted by the Supreme Court also in *New Theatres (Carnatic Talkies) Ltd. v. N.Vajrapani*, A.I.R.1984 S.C.1. Thus, the several stages and steps have been clearly indicated in the decision of the Division Bench referred to above. In this case, from the narration of the several prior proceedings that have taken place between the parties, it is seen that on 24.3.1965, the respondent was held entitled to claim the benefits of the Act and the minimum extent was finally fixed by this Court in C.R.P.No.2954 of 1974 on 6.8.1975, when the price fixed by the Courts below was also affaired by this Court. Though, as per the decision of the Division Bench referred to above, it is necessary first to decide the minimum extent of the land and thereafter the price, yet, in this case, it is seen that the price as fixed by the trial court had been accepted right through and there had been a variation in the extent in that the claim of the respondent was restricted to the portion APQR as against the entire extent of 2,381 square feet stated by the respondent to be minimum extent required for his convenient enjoyment. Undoubtedly, this Court had, while dealing with C.R.P. No.2954 of 1974, the jurisdiction under section 9 of the Act for all or any of the purposes enumerated thereunder. It may be that while dealing with the claim of the respondent this court had not adhered at the time of disposing of

C.R.P.No.2954 of 1974 to the several stages pointed out in the decision in *Arasan Chettiar v. Narasimhulu Naidu's Estate Trust*, (1980) 2 M.L.J.303 . But that would not render the decision given in C.R.P.No.2954 of 1974, while it fixed the price as well as the minimum extent, as one lacking in jurisdiction. At best, it may be said that instead of exercising the jurisdiction with reference to the ascertainment of the minimum extent of the land and the price thereof in stages, it had proceeded to exercise the jurisdiction at the same time or at one stroke. But that is not the same as clutching at jurisdiction or assuming jurisdiction, which the court did not have, so as to render the adjudication itself of no consequence or not to operate as *res judicata*. Clearly in this case, while exercising jurisdiction which the court had for the purposes of considering an application under section 9 of the Act, the Court had considered not only the extent, but also the price. At best it may amount to only a case of exercise of jurisdiction not in conformity with (1980) 2 M.L.J.303 , but not total lack of it. The decision in *Jai Singh Jairam Tyagi v. Manan Chand*, A.I.R.1980 S.C.1201 relied on by the learned counsel for the petitioner does not, in my view, assist him. In that case, it was argued that the decision of the executing Court declaring the reliance was placed upon the decision of the Supreme Court in *Mathura Prasad Sarjoo Jaiswal v. Dossibai N.B.Jeejebhoy*, (1970)2 S.C.J.685: (1970) R.C.J.1091: (1970)3 S.C.R.830: A.I.R.1971 S.C.2355: A.I.R.1971 S.C. 2359. The Supreme Court repelled this contention stating that the executing Court, in the face of the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, had no jurisdiction to execute the decree, which defect was subsequently removed and that, therefore, it cannot be said that the earlier adjudication in execution proceedings operated as *res judicata*. This decision has no application to the present case, for, as pointed out earlier, the Court had the jurisdiction to deal with the application under section 9 of the Act and had also exercised such jurisdiction. It may be that the decision arrived at by the exercise of such jurisdiction was contrary to the decision of the subsequent Division Bench, but that is not a ground for holding that an erroneous decision was arrived at by an assumption of jurisdiction which the Court did not have. Under those circumstances, the decision of the Supreme Court in *Jai Singh Jairam Tyagi v. Manan Chand*, A.I.R.1980 S.C.1201 cannot advance the case of the petitioner. The decision in *New Theatres (Carnatic Talkies) Ltd. v. N.Vajapani*, A.I.R.1984 S.C.1 also does not lend any support to the contention of the learned counsel for the petitioner. There also, an order had been passed under section 9 of the Act for the sale of the site holding that the tenant was entitled to purchase the site on payment of the full market value current on that date. A further direction was also given to the trial Court to appoint a Commissioner to fix the value of the site and after that order was so made and the matters were pending, the principal Act was amended. The pending proceedings had, therefore, to be subjected to the operation of the amended statute and the order originally passed for sale of the property on payment of the current market value had to be aborted necessitating the taking of fresh proceedings in order to give a disposal to the same. Such is not the situation in this case, and, therefore, there is no question of the fixation of the price being considered afresh.

4. It is, however, seen even from the principles laid down in the decision relied on by the learned counsel for the petitioner that in considering the question of *res judicata*, the Court is not concerned with the correctness or otherwise of the judgment rendered earlier. A finding rendered on a fact in issue by the competent court in earlier proceedings should be regarded as having been finally decided in a subsequent litigation raising the same issue between the same parties. Even if a mixed question of fact and law had been determined between the same parties, that may not also be questioned in the subsequent proceedings. Where

the decision is on a question of law, namely, interpretation of a statute, that would also operate as *res judicata* is a subsequent proceedings between the same parties where the cause of action is also the same. In this case, the extent of the land as well as its price were the subject-matter of the earlier proceedings and the Courts which decided these question had jurisdiction to decide them. The questions decided were essentially factual. Even on the basis that something turned upon the interpretation of the words "the date of the order", the questions decided earlier by the Courts would be mixed questions of law and fact and as pointed out by the Supreme Court in *Mathura Prasad Sarjoo Jaiseal v. Dossibai N.B.Jeejabhoy*, A.I.R.1971 S.C.2355 such a mixed question of law and fact determined in the earlier proceedings between the same parties may not, for the reason that it had been decided in an earlier proceeding, again be questioned in the subsequent proceedings between the same parties. In the decision in *Panchapakesan v. Swaminathan*, (1976) I M.L.J. 338 , Ramaprasada Rao, J. (as he then was) has affirmed the decision of the courts below and found that 24.3.1965 is the relevant date, as the respondent was first held entitled to claim the benefits of the Act then. Even on the assumption that it was an erroneous decision, the parties should be held to be bound by the same. The circumstance that the decision of Ramaprasada Rao, J. (as he then was) in *Panchapakesan v. Swaminathan*, (1976) I M.L.J.338 , was not accepted by the Division Bench in *Arasan Chettiar v. Narasimhulu Naidu's Estate Trust*, (1980) 2 M.L.J. 303 would not enable the petitioner to contend that on that account, it ceases to operate as *res judicata*. A final binding adjudication inter-partes on a mixed question of fact as well as law, as we have in this case, will not in any manner be affected by any subsequent decision not accepting the principle laid down in the former decision (Vide *Sadhu Charan v. E.Naik*, A.I.R. 1964 Orissa 121). The correctness or otherwise of a decision viewed in the light of a subsequent decision has really no bearing upon the question whether it could operate as *res judicata* or not. All that is necessary to be established is that the matter was directly and substantially in issue in the former proceeding and that it had also been heard and finally decided. To accept the stand of the petitioner that by reason of the decision in *Arasan Chettiar v. Narasimhulu Naidu's Estate Trust*, (1980) 2 M.L.J.303 , the prior decision in *Panchapakesan v. Swaminathan*, (1976) I M.L.J.338 would not operate as *res judicata*, is to undo and alter the rights of parties settled by an adjudication of a Court of competent jurisdiction. If the binding character of a decision is made to fluctuate with every change in the current of authority, the Court machinery would be reduced to one for unsettling the rights rather than giving effect to rights already ascertained. Under these circumstances, the lower appellate court was right in its conclusion that the prior adjudication in C.R.P.No.2954 of 1974 operates as *res judicata* and would preclude the petitioner from contending that a re-determination or re-fixation of the price should be made contrary to the earlier adjudication. In view of this, it is really unnecessary to consider any other question. Consequently, the order of the lower appellate Court is confirmed and the Civil Revision Petition is dismissed. There will be, however, no order as to costs.

R.S. ---- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *S.Natarajan, J.*

*W.M.P.Nos.1538, 3021, 4029, 5756 etc of 1984 in W.P.Nos.986, 1994, 2642, 3697 etc of 1984. 10th *August*, 1984.

R.Venkatesan and others *Petitioners**

v.

The Chief Conservator of Forests, **Madras-6 and others** *Respondents.*

Tamil Nadu Forest Subordinate Service Rules, Rule 5, clause (vi) - Foresters temporarily promoted as Rangers - Orders of reversion passed - Writ petition challenging the orders - Interim stay of operation of the orders granted - Revision Petition to vacate the stay.

Foresters temporarily promoted as Rangers filed writ petitions impugning the orders of reversion Interim stay had been granted. The direct recruits concerned wanted the stay to be vacated.

Held:- Under the Tamil Nadu Forest Subordinate Service Rules, the posts of Rangers have to be filled up from four sources viz.
(1) Forest apprentices;
(2) Foresters trained in Rangers college run by the Government of India,
(3) Foresters trained by the State Forestry Training Centre and
(4) Members of the Madras Ministerial Service in the Forest Department who have been suitably trained.

The Rules prescribe a quota for each of the four sources, viz, 50 per cent for forest apprentices, 25 per cent and 20 per cent respectively for foresters trained in the Central and State training institutions and 5 per cent for the members of the Ministerial service. *[Para.2]*

There are only 208 permanent vacancies for the posts of Rangers. Besides, there were 319 temporary posts. The combined total comes to 527. The forestors trained in the State Trading Institution can be posted as rangers only for 105 posts; there are actually 376 promotees now. There is no justification in law to accept the contention of the promotees that only 104 forest apprentices can be posted as Rangers. *[Para.6]*

Apart from the injustice to the forest apprentices, the interests of the State also require the posting of all the forest apprentices as rangers. If only 104 forest apprentices are posted as rangers and the remaining are posted as forestors, they will be drawing a higher pay but rendering service in lesser posts. There will, therefore be unnecessary wantage of public funds. *[Para.7]*

Petitions praying that in the circumstances stated therein and in the respective affidavits filed with W.P.Nos.986, 2642, 3697, 4072 and 4073 of 1984, on the file of the High Court, the High Court, will be pleased to stay the operation (1) of order of the Second respondnet in W.M.P.Nos.3021, 4029/84 and of the respondents (in W.M.P.Nos. 5756, 6396 and 6397 of 1984) in his proceedings in Ref.Nos.B.2/101430/83-16, dt. 15.11.83; (2) B2/101430/83-48, dt. 12.1.84; (3) B2/101430/83-44, dt. 6.1.84; (4) B2/101430/83, Dt. 20.11.83 and (5) B3/119126/83-1, dated 28.11.83 respectively pending W.P.Nos.1994, 2642. 3697, 4072 and 4073 of 1984 presented to this Court under Article 226 of the Constitution of India to issue a writ of Certiorarified Mandamus calling for the records relating to the order of the second respondent in his proceedings (1) Ref.No.B2/101430/83-16 dt. 15.11.83; (2) B2/101430/83-40, dt. 12.1.84; (3) B2/101430/83-44, dt.6.1.84; (4) B2/101430/83-16 dt.20.11.83 and (5) B3/119126/83-1 dt. 28.11.1983 respectively and quash the same as null and void and directing (1) the respondents 1 to 3 to regularise the services of the petitioner in the category of Forest Ranger (in W.P.1994/84). (2) the respondents not to revert the petitioner from the post of Forest Ranger to the Post of Forestor in the Department of Forests in order to retain the surplus Forest Apprentices - appointed as Rangers, recruited in excess of 50%

ratio rule which is violative of Rules 2 and 9(a) of the Tamil Nadu Forest Subordinate Special Rules, (in W.P.Nos. 2642, 3697, 4072, 4073/84).

W.M.P.Nos.10616, 10620, 10622, 10624 and 10626/84.:-

Petitions presented to this Court to vacate the interim stay granted in and by orders of this Court dated 5.3.84, 14.3.84, 6.4.84 and 16.4.84, and made in W.M.P.Nos.3021, 4029, 5756, 6396 and 6397 of 1984 respectively aforesaid.

P.Chidambaram, for C.Johnson, V.P.Raman, R.Gandhi, N.Ganapathy, V.Anandaraju, for Petitioners.

The Advocate-General, assisted by *K.R. Natarajan,* Govt. Advocate, for Respondents.

The Court made the following

ORDER:- There is a wrangle between Forest Apprentices (direct recruits) and Foresters (Promotees) about the manner in which the posts of Forest Rangers are to be filled. Foresters who have been temporarily promoted as Rangers have filed the writ petitions to impugn the orders of reversion passed against them. Interim stay has been granted, and now, the direct recruits want the stay to be vacated.

2. Under the Tamil Nadu Forest Subordinate Service Rules (hereinafter referred to as the Rules), the posts of Rangers have to be filled up from four sources viz.
(i) Forest apprentices;
(ii) Foresters trained in Rangers' College run by the Government of India,
(iii) Foresters trained by the State Forestry Training Centre and
(iv) Members of the Madras Ministerial Service in the Forest Department who have been suitably trained.
The rules prescribe a quota for each of the four sources, viz. 50 per cent for Forest apprentices, 25 per cent and 20 per cent respectively for foresters trained in the Central and State training institutions and 5 per cent for the members of the Ministerial service.

3. There are only 208 permanent vacancies for the posts of rangers. Besides, there are 319 temporary posts. The combined total comes to 527.

4. There are 219 forest apprentices waiting for appointment. The contention of the promotees is that only 104 forest apprentices can be appointed as rangers, because the number of permanent posts is only 208. On the other hand, the contention of the forest apprentices is that the total number of posts, permanent and temporary, now existing, is 527 and 50 per cent of that would come to 263, and therefore, all the 219 forest apprentices can be posted without any difficulty.

5. In support of their contention, the promotees place reliance on clause (vi) of Rule 5 which reads as follows:

> "When no officiating or substantive vacancy in the category of rangers exists, forest apprentices who have satisfactorily completed their probation shall, until any vacancy arises, be appointed as foresters."

According to the promotees, the 50 per cent quota available to forest apprentices would have reference only to the substantive posts and not temporary posts. The contention of the promotees cannot be accepted for the following reasons:

(1) No doubt, clause (vi) does not refer to temporary posts, but only officiating or substantive vacancies. There is no warrant for holding that forest apprentices who have a 50 per cent quota should be posted as rangers only against substantive vacancies, but the promotees from the cadre of foresters, who have only 25 and 20 per cent quotas of reservation respectively, should have no such restriction and be posted as rangers to the detriment of the forest apprentices. The percentage rule has

to be applied with reference to all the posts, viz. officiating or substantive vacancies or temporary posts.

(2)The promotees would say that forest apprentices who are not posted as rangers would not suffer any loss because they are entitled as per the rules to be posted as foresters till such time permanent vacancies occur. The same rule would govern the promotees also because, on reversion, they too would hold their substantive posts of foresters and draw the salary and allowances relatable to those posts. It has to be borne in mind that forest apprentices have been specifically recruited for being posted as rangers. Only in the extreme event of there being no vacancy, they can be posted as foresters till such time vacancies arise. That would not mean that when temporary vacancies are available, they should not be posted in those temporary vacancies; but should be forced to stand down in favour of promotees who have only lesser quotas of reservation.

6. The counter filed by the State contains a tabular statement, which gives the particulars of appointment of members belonging to each of the four sources:

Category	*Percentage Prescribed.*	*Admissible number out of total sanctioned strength*	*Number actually employed*	*Excess/ short fall*
1. Forest Apprentices	50%	263	219	44 short fall
2. Foresters who have completed Rangers' Course (Tained Foresters)	25%	132	62	70 -do-
3. Tamil Nadu Ministerial Service who have completed (Rangers' Course)	5%	27	22	5 short fall
4. Foresters who have completed Foresters' Training (Un trained Foresters)	20%	105	376	217 Excess.
Total		527		

From this, it may be seen that when foresters trained in the State Training Institution can be posted as rangers only for 105 posts, there are actually 376 promotees now. There is no justification in law to accept the contention of the promotees that only 104 forest apprentices can be posted as rangers and the remaining 423 posts must be allowed to be filled by promotees and transferees whose combined total comes only to 50 per cent.

7. Apart from the injustice to the forest apprentices, the interests of the State also require the posting of all the forest apprentices as rangers. If only 104 forest apprentices are posted as rangers and the remaining are posted as forestors, they will be drawing a higher pay but rendering service in lesser posts. There will, therefore, be unnecessary wastage of public funds.

8. No doubt, by reason of the stay order being vacated, the juniormost of the promotees who are now holding the posts of rangers would face reversion. But, that situation cannot be averted. They have been given promotion only on a temporary basis and when someone with a superior claim to the post has to be given posting, the process of reversion is an inevitable necessity.

9. For the aforesaid reasons, the stay orders granted by this Court will stand vacated and the petitions for stay will stand dismissed. The petitions for the interim stay being vacated will stand allowed. The petitions for impleadment of the proposed parties will stand ordered.

R.S. ---- *Stay vacated Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *P.R.Gokulakrishnan, J.*

*C.R.P.No.614 of 1984. *27th April*, 1984.

Revathi C.P.Equipment Limited, Coimbatore, represented by its Finance Manager *Petitioner**

v.

Sangeetha Tubawell Corporation, Madras-17 and another *Respondents.*

Civil Procedure Code (V of 1908), Order 41, rule 5 - Scope and applicability.

The first defendant, the petitioner herein, sold drilling rig to the first respondent herein who was the plaintiff in the suit for Rs.38 lakhs and odd. The payment of this money had to be made as follows:-

(i) Downright payment of 10 per cent; (ii) Balance in 10 half-yearly instalments for which 10 Bills of Exchange were executed by the plaintiff/company and such a procedure was accepted by the Canara Bank, the second defendant in the suit. Just when the first instalment was about to mature, the plaintiff filed the present suit for an injunction to restrain the Bank and the petitioner from withdrawing money under the Bills of Exchange. The total value of the 10 Bills of Exchange, according to the learned counsel for the plaintiff, was Rs.49,44,800/-. The trial court granted an *ex parte* injunction and finally the suit was decreed in favour of the plaintiff, the first respondent herein, on 4.5.1983. An appeal by the defendant therefrom was allowed. Immediately after the pronouncement of the judgment by the First Additional City Civil Judge, Madras the plaintiff in the suit filed C.M.P.No.248 of 1983 in A.S.No.346 of 1983 under Order 41, rule 5, Civil Procedure Code, for staying the execution of the decree passed by the First Additional City Civil Judge. The amount due under three bills of exchange already matured was allowed to be collected on bank guanantee being given.

Thus, it is clear from the order and from the provisions of Order 41, rule 5(2) that the said order was passed pending filing of second appeal by the plaintiff in the original suit. On the question whether by passing such an order the Court has modified its own decree,

Held:- As per Order 41, rule 5, Civil Procedure Code, the Court that passed the decree has ample power to stay the decree pending filing of an appeal against the said decree. Instead of completely staying the decree, the Court thought it fit to permit the petitioner herein to withdraw the amount on furnishing security. This order, has not at all transgressed the powers vested with the Court under Order 41, rule 5(2), Civil Procedure Code, and the Court has properly exercised that power in passing such an equitable order pending filing of an appeal. *[Para.2]*

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the City Civil Court (I Additional Judge), Madras dated 17-11-1983 and made in C.M.P.No.248/83 in A.S.No.346/83.

T.Dulip Singh for King and Partridge, for Petitioner.

S.Soundarajan, M.Srinivasan for M.Balachandran and Kousalya Balachandran, for Respondents.

The Court made the following

ORDER:- The first defendant is the petitioner herein. The plaintiff filed the suit O.S.No.6589 of 1982 on the file of the City Civil Court, Madras, for an injunction restraining the Canara Bank and the petitioner herein to withdraw the money under Bills of Exchange. The short facts of the case are that the first defendant in the suit who is the petitioner herein sold drilling rig to the first respondent herein who is the plaintiff is the suit for Rs.38 lakhs and odd. The payment of this money has to be made as follows: (1) Downright payment of 10 per cent; (ii) Balance of 10 half-hearly instalments for which 10 Bills of Exchanges were executed by the plaintiff/Company and such a procedure was accepted by the Canara Bank who is the second defendant in the suit. Just when the first instalment was about to mature, the plaintiff filed the above-said suit. The total value of the 10 Bills of Exchange, according to the learned counsel for the plaintiff, was Rs.49,44,800/-. The trial court granted an *ex parte* injunction and finally the suit was decreed in favour of the plaintiff who is the first respondent herein on 4-5-1983. Let me not go into the reason as to why the suit was decreed. Suffice it to say that the first defendant filed an appeal in A.S.No.346 of 1983. The First Additional City Civil Judge allowed the appeal. With the result, the petitioner herein can get the amount under the Bills of Exchange matured even without furnishing security. Immediately after the pronouncement of the judgment by the First Additional City Civil Judge, Madras the plaintiff in the suit filed C.M.P.No.248 of 1983 in A.S.No.346 of 1983 under Order 41, rule 5, Civil Procedure Code, for staying the execution of the decree passed by the First Additional City Civil Judge. The First Additional City Civil Judge taking this application passed orders stating:-

> "Therefore the earlier order permitting the first defendant to collect that amount covered by the three bills of exchange which have matured is confirmed and D-1 will be entitled to collect that amount with interest that accrued due furnishing bank guarantee through State Bank of India as desired by the counsel for the respondent. Of course it is needless to say that the rights of parties to agitate in a further higher forum cannot at all the affected by the order passed by this court. The petition is disposed of on the above lines."

Thus, it is clear from the order and from the provisions of Order 41, rule 5(2) that the said order is passed pending filing of second appeal by the plaintiff in the original suit. Order 41, rule 5(2) reads as follows:

"Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed."

It is clear from the said Order that the Court which passed the decree has ample power to stay its decree pending filing of an appeal.

2. Mr.D.Souza, learned counsel appearing for the petitioner, submits that by such an order the Court has modified its own decree. I am afraid I cannot countenance this argument. There is no question of modification of the order. As per Order 41, rule 5, Civil Procedure Code, the Court that passed the decree has ample power to stay the decree pending filing of an appeal against the said decree. Instead of completely staying the decree, the Court thought it fit to permit the petitioner herein to withdraw the amount on furnishing security. This order, in my opinion, has not at all transgressed the powers vested with the Court under Order 41, rule 5(2), Civil Procedure Code, and the court has properly exercised that power in passing such an equitable order pending filing of an appeal. Hence I do not find any merit nor any error of law or jurisdiction involved for me to interfere with the order passed by the court below in C.M.P.No.248 of 1983.

3. For all these reasons, the revision is dismissed with costs.

R.S. ----- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *V.Ratnam, J.*

*S.A.No.1724 of 1980. 30*th July,* 1984.

G.Natesa Nainar *Appellant**

v.

Sri **Karikudinathaswamy** Devasthanam, **Marudhanallur, Kumbakonam** Taluk, represented **by its present** Executive Officer, **K.Anbalagan** *Respondent.*

(A) Civil Procedure Code (V of 1908), section 11 - Explanation IV - Res judicata - Scope and applicability of principle.

(B) Tamil Nadu Cultivating Tenants' Record of Tenancy Right Act (10 of 1969), section 16-A - Mere entry in the Record of Tenancy Rights Register would not clothe person with rights as a cultivating tenant - Person alleging lease of uncultivable land for purposes of reclamation and planting of coconuts - Whether such person is cultivating tenant - Jurisdiction of the Civil Court to decide.

(C) Tamil Nadu Act (57 of 1961) - The Madras Public Trusts (Regulation of Administration of Agricultural Lands) Act (1961), section 2(5) - Lands converted into thopes - Applicability of the provision.

The plaintiff had brought O.S.No.534 of 1970 in the Munsif's Court on the basis of his being the lessee of uncultivable land for purposes of reclamation and planting of coconuts and acquisition of rights thereby as a cultivating tenant. The claim was denied by the defendant. As issue was taken specifically, whether the plaintiff was a cultivating tenant. Reversing the finding of the Munsif the lower appellate Court held that the plaintiff was only a licensee and was not entitled to claim any rights as a cultivating tenant. The court also held that in any case having regard to section 51(iv) of Tamil Nadu

Act 57 of 1961 statutory rights cannot be claimed as a cultivating tenant. On further appeal to the High Court in S.A.No.1332 of 1974 these conclusions were upheld. The plaintiff in the mean-while had before the suit was decided secured an entry in the Record of Tenancy Rights Register in his favour as a cultivating tenant under the Tamil Nadu Cultivating Tenants (Record of Tenancy Right) Act. In the present suit, the plaintiff claimed the same rights as a cultivating tenant with the addition of the Entry in the Record of Tenancy Rights Register. The Munsif's Court held that the present suit was not barred by *res judicata*.
The lower appellate Court differed.
On second appeal,

Held:- The provisions of Tamil Nadu Act 10 of 1969 pertain to the preparation of the record and are not declaratory of rights as a cultivating tenant. It is common knowledge that there may be several persons fulfilling the requirements of the definition of a cultivating tenant, but whose names may not be recorded in the Record of Tenancy Rights Register. Do they cease to be cultivating tenants? They do not. Equally, it has to be borne in mind that a person may not be a cultivating tenant at all, but manages to secure an entry to that effect in his name. Would such a person become a cultivating tenant merely by reason of his name being found in the Record of Tenancy Rights Register? He does not obtain or secure any rights as a cultivating tenant. The entry in Record of Tenancy Rights Register does not confer by itself any right on a person as a cultivating tenant unless he satisfies the other requirements. *[Para.5]*

In this case, in the course of the earlier proceedings, the lower appellate Court and the High Court found that the appellant was only a licencee of the usufructs, namely the coconuts and had no rights whatever in the soil. The suit was instituted on 20.8.1970 and was originally decreed *ex parte* on 14.7.72, but had been later restored to file on 18.12.1972 in I.A.No.1013 of 1972. The entry in the Record of Tenancy Rights Register has come into being in the interval and has been published in the Gazette on 11.10.1972. The suit had been disposed of on 16.2.1973 so that the right based upon the entry in the Record of Tenancy Rights Register was also available to the appellant as a ground to secure an order for injunction in his favour as prayed for in O.S.No.534 of 1970. But the appellant did not specifically urge the right available to him on the strength of the entry in the Record of Tenancy Rights Register prior to the disposal of the suit. To such a situation, Explanation IV to section 11, Code of Civil Procedure, would squarely stand attracted so that the appellant cannot be heard now to contend that some rights have been secured on the strength of the entry in the Record of Tenancy Rights Register and they can be enforced in the course of a subsequent suit based more or less on the very same claims as were agitated and negatived in the prior suit. *[Para.5]*

In this case, the suit in O.S.No.534 of 1970 had been instituted on 20.8.1970, long prior to the introduction and coming into force of section 16-A of Tamil Nadu Act 10 of 1969 on 27.11.1972. That would mean according to the principles laid down in the Full Bench decision in *Periathambi Gounden v. District Revenue Officer*, (1980)2 M.L.J.89= I.L.R.(1980)2 Mad.255= A.I.R. 1980 Mad.180 the court was fully competent to deal with the questions agitated before it including that of the status of the appellant as a cultivating tenant. That the appellate Courts were also likewise competent to deal with such a question has also been pointed out by the Full Bench. *[Para.6]*

In this case there is no dispute that the respondent being a temple would be a public trust within the meaning of section 2(25) of the Tamil Nadu Act 57 of 1961. Even assuming as claimed by the appellant that he has secured rights as a cultivating tenant in respect of the property belonging to a public trust and would be a cultivating tenant under section 2(5) of Act 57 of 1961, section 51(iv) of that Act

excludes the applicability of the provisions of the Act to lands converted into thopes. There is no dispute that the property in question is a coconut thope and therefore, the appellant cannot be heard to agitate cultivating tenancy rights as against the respondent. *[Para.7]*

Cases referred to:-

Periathambi Goundan v. District Revenue Officer, (1982)2 M.L.J.89= I.L.R. (1980)2 Mad.255= A.I.R.1980 Mad.180; *Venkata Seshayya v. Kotiswara Rao*, L.R.64 I.A.17= (1937)1 M.L.J.113= I.L.R. (1937) Mad.263= A.I.R.1937 P.C.1.

G.Subramaniam for *M.Kalyanasundaram*, Counsel, for Appellant.

N.Vanchinathan Counsel, for Respondent.

The Court delivered the following

JUDGMENT:- The plaintiff in O.S.No.252 of 1978, District Munsif's Court, Kumbakonam, who succeeded before that Court and lost before the lower appellate Court, is the appellant in this second Appeal. The property in dispute is an extent of 2 acres and 62 cents of punja situate in R.S.No.31-2A in Marudhanallur village, Papanassm taluk and admittedly this property belongs to the respondent. According to the case of the appellant, originally, the property in dispute was uncultivable waste and in 1947 was leased out to the appellant on an agreement that the appellant should spend and reclaim the property and render it cultivable and plant coconut trees and rear them also at his expense. It was also further agreed that when the trees reached the yielding stage, the appellant should execute a lease deed to the respondent agreeing to pay rent. The appellant claimed that he spent a sum of Rs. 3,000/- in reclaiming the land and in planting coconut saplings. The further case of the appellant was that he was in possession of the property as a lessee and had also been recorded as a cultivating tenant. An earlier suit in O.S.No.534 of 1970 on the file of the District Munsif, Kumbakonam according to the appellant, was filed by him praying for the relief of permanent injunction and though that suit was decreed by the trial Court, the lower appellate Court dismissed the suit holding that the appellant was not entitled to a permanent injunction against the respondent, but such an adjudication, according to the appellant, would not bar the present suit. The appellant reiterated his possession of the property and put forth the plea that the respondent had no right to forcibly take possession of the property from the appellant. Alleging that the respondent was attempting to lease out the property in open auction and that the auction was fixed for 24-7-1978 and the respondent without taking possession of the property from the appellant under due process of law cannot do so, the appellant prayed that the respondent should be restrained by an injunction from interfering with his possession of the property in dispute except under due process of law and other incidental reliefs.

2. In the written statement filed by the respondent herein, the case of the appellant that the disputed property was lying waste and that there was an agreement for reclaiming that property with the funds of the appellant and for planting coconuts and for the execution of a lease deed was denied. The status of the appellant as a cultivating tenant was questioned as, according to the respondent, the suit property was a coconut thope and as such exempted under the provisions of Tamil Nadu Act 57 of 1961. Referring to the institution of O.S.No.534 of 1970, District Munsif's Court, Kumbakonam, the respondent contended that the matter was taken in S.A.No.1332 of 1974 before this court and therein it had been found that the right of the appellant was only to enjoy the usufructs of the coconut trees without any rights to the soil and the dismissal of the prior suit in O.S. No.534 of 1970, District Munsif's Court, Kumbakonam, would operate as *res judicata* and, therefore, the suit was not

maintainable. Claiming that a notice was issued to the appellant with a view to put up the usufructs of the coconut trees in public auction, the respondent set up the plea that the public auction was duly held in the presence of the Inspector, Hindu Religious and Charitable Endowments Department, pursuant to the directions given by the Assistant Commissioner, Hindu Religious and Charitable Endowments Department, and one T.Krishnaswamy Reddiar became the successful bidder in such public auction. Refuting the claim of the appellant that he was in possession of the disputed property, the respondent stated that the appellant was not entitled to any protection by the grant of an injunction and that the possession of the appellant, if any, would only be that of a trespasser. On the aforesaid grounds, the respondent prayed for the dismissal of the suit.

3. Before the learned District Munsif, Kumbakonam, on behalf of the appellant, Exhibits A.1 to A.4 were marked and the appellant and three others were examined as P.Ws.1 to 4, while, on behalf of the respondent, Exhibits B.1 to B.3 were filed and the Executive Officer of the respondent-temple was examined as D.W.1. On a consideration of the oral as well as the documentary evidence, the learned District Munsif, Kumbakonam, found that though the prior suit in O.S.No.534 of 1970 had been decided against the appellant, yet, on the basis of the entry in the Record of Tenancy Rights Register secured by the appellant, he would be entitled to file a fresh suit praying for the relief of injunction and such a suit would not be barred by *res judicata*. Possession of the disputed property was also found with the appellant and an injunction as prayed for by the appellant was granted as, according to the trial Court, the appellant was not a trespasser and his possession was lawful. In the result, the suit was decreed. Aggrieved by this, the respondent herein preferred an appeal in A.S.No.97 of 1979, Sub Court, Kumbakonam. On an exhaustive reconsideration of the oral as well as the documentary evidence and also taking into account the scope and effect of the prior adjudication which culminated in S.A.No. 1332 of 1974 before this Court, the learned Subordinate Judge held that only the usfructs of the coconut trees were leased out to the appellant and he would only be a licensee and cannot claim rights as a cultivating tenant based on the entry in the Record of Tenancy Rights Register and further that the suit was barred by *res judicata*. On those conclusions, the lower appellate court reversed the judgment of the trial Court and dismissed the suit. It is the correctness of this that is challenged by the appellant in this Second Appeal.

4. The main contention of the learned counsel for the appellant is that the prior proceedings ending with S.A.No. 1332 of 1974 before this Court would not operate as *res judicata*. Elaborating this, the learned counsel for the appellant submitted that Exhibit A.1, the entry in the Record of Tenancy Rights Register, conferred rights on the appellant as a cultivating tenant and having regard to the conclusiveness of the correctness of the entry in the Record of Tenancy Rights Register as declared by the provisions of Tamil Nadu Act 10 of 1969, the right of the appellant as a cultivating tenant and his entitlement to possession as a cultivating tenant and the protection of such possession cannot be denied to him. Reference was also made in this connection by the learned counsel to the fact that by the time O.S.No.534 of 1970 was disposed of on 16-2-1973, section 16-A of Tamil Nadu Act 10 of 1969 had been enacted and had come into force with effect from 27-11-1972 and, therefore, the adjudication in O.S.No. 534 of 1970 could not be relied upon by the respondent to throw out the present suit. Per contra, the learned counsel for the respondent submitted that rights urged by the appellant in the course of O.S.No.534 of 1970 and the present suit were the same, namely, rights as cultivating tenant and such rights had been negatived by this Court on a former occasion and it is, therefore, not open

to the appellant to reagitate the same rights. Referring to the entry in the Record of Tenancy Rights Register, the learned counsel pointed out that the very object of Tamil Nadu Act 10 of 1969 is only to prepare a record of rights and not to confer rights and that the mere entry does not confer any rights on any person and, therefore, it is not open to the appellant to claim rights on the basis of the entry in the Record of Tenancy Rights Register. Adverting to the argument on behalf of the appellant relating to the invalidity of the adjudication in O.S.No.534 of 1970, the learned counsel for the respondent relied upon the decision of the Full Bench in *Periathambi Goundan v. District Revenue Officer*, (1980)2 M.L.J.89 @ 99: I.L.R.(1980)2 Mad 255= A.I.R.1980 Mad. 180 to contend that all proceedings instituted prior to the introduction of section 16-A in Tamil Nadu Act 10 of 1969 had to be dealt with and disposed of as if that section had not come into force and, therefore, the adjudication in O.S.No. 534 of 1970, though made on 16-2-1973, cannot be characterised to be one by a court not competent to adjudicate upon such matters and, therefore, section 11, Code of Civil Procedure, would squarely apply. Besides, it was also pointed out by the learned counsel for the respondent that the right asserted by the appellant in the earlier suit and the present suit was the same, namely, the right of a cultivating tenant and the appellant should have set forth all grounds on the basis of which he claims such rights and if he had failed to do so, then he would be barred by Explanation IV to section 11, Code of Civil Procedure, as well.

5. Before embarking upon a consideration of the rival contentions urged, it is necessary to note the circumstances which led to the institution of O.S.No. 534 of 1970 and the scope of the adjudication therein. It is seen from Exhibit B-1, the printed copy of the judgment in O.S.No.534 of 1970, District Munsif's Court, Kumbakonam, that the basis on which the appellant laid O.S.No.534 of 1970 is the same as in the present suit, out of which the Second Appeal has arisen, namely, lease of uncultivable land for purposes of reclamation and planting of coconuts and acquisition of rights by the appellant therein as a cultivating tenant. It was this claim so made by the appellant that was refuted by the respondent in the written statement filed in the course of the earlier suit. On those pleadings, issue No.1 related to the question whether the plaintiff (appellant herein) was a cultivating tenant of the suit property. Though the learned District Munsif in Exhibit B-1 found that the appellant was a lessee of the property and not a mere licensee for the collection of the usufructs and a cultivating tenant as well of the property, the lower appellate Court in A.S.No.78 of 1973 reversed that finding and held that the appellant was not entitled to claim any rights as a cultivating tenant in the property belonging to the respondent and that he had not established the raising of any crops therein, but that the appellant was only a licensee of the usufructs of the coconut trees and nothing more and further that in any case having regard to section 51(iv) of Tamil Nadu Act 57 of 1961, the appellant cannot be heard to claim statutory rights as a cultivating tenant. It was in that view that the suit instituted by the appellant in O.S.No.534 of 1970 was dismissed. In S.A.No.1332 of 1974 disposed of on 7-2-1977 by this Court, the conclusions arrived at by the lower appellate Court were upheld that what had been leased out in favour of the appellant was only the usufructs of the coconut trees and he had no right in the soil and that even on the assumption that the appellant was a lessee of the suit property, yet by virtue of section 51(iv) of Tamil Nadu Act 57 of 1961, the provisions of the Tamil Nadu Cultivating Tenants Protection Act will not apply and further that having regard to the exemption under section 51(iv) of Tamil Nadu Act 57 of 1961 exempting of thopes, the appellant would not be entitled to any rights in the soil as a cultivating tenant and, therefore, no injunction could be granted in his favour. It is thus

seen from Exhibit B-1 and from the appeals therefrom that the very right projected by the appellant to the disputed property in question was as a cultivating tenant and that claim had been negatived on the ground that the appellant was only a licensee of the usufructs in the coconut thope and had no rights whatever in the soil. In the suit out of which the present Second Appeal has arisen, the appellant has claimed the same rights as a cultivating tenant with the addition of the entry in the Record of Tenancy Rights Register in his favour. That however would not make any difference to the applicability of the principle of *res judicata*. It has to be remembered that the entry in the Record of Tenancy Rights Register by itself does not confer any right upon the appellant as a cultivating tenant for the main aim and purpose of the provisions of Tamil Nadu Act 10 of 1969 is only to prepare and maintain a record of tenancy rights in respect of agricultural lands in Tamil Nadu. No provision in Tamil Nadu Act 10 of 1969 has been brought to the notice of the Court to show that an entry in the Record of Tenancy Rights Register confers right as a cultivating tenant on a person whose name is so entered. The provisions of Tamil Nadu Act 10 of 1969 pertain to the preparation of the record and are not declaratory of rights as a cultivating tenant. It is common knowledge that there may be several persons fulfilling the requirements of the definition of a cultivating tenant, but whose names may not be recorded in the Record of Tenancy Rights Register. Do they cease to be cultivating tenants? They do not. Equally, it has to be borne in mind that a person may not be a cultivating tenant at all, but nevertheless manage to secure an entry to that effect in his name. Would such a person become a cultivating tenant merely by reason of his name being found in the Record of Tenancy Rights Register? In my opinion, he does not obtain or secure any rights as a cultivating tenant. The entry in the Record of Tenancy Rights Register, as pointed out earlier, does not confer by itself any right on a person as a cultivating tenant unless he satisfies the other requirements. In the course of the earlier adjudication in O.S.No.534 of 1970, the lower appellate court and this court found that the appellant was only a licensee of the usufructs, namely the coconuts and had no rights whatever in the soil. The suit was instituted on 20-8-1970 and was originally decreed *ex parte* on 14-7-1972, but had been later restored to file on 18-12-1972 in I.A.No.1013 of 1972. The entry in the Record of Tenancy Rights Register has come into being in the interval and has been published in the Gazette on 11-10-1972. The suit had been disposed of on 16-2-1973 so that the right based upon the entry in the Record of Tenancy Rights Register was also available to the appellant as a ground to secure an order for injunction in his favour as prayed for in O.S.No.534 of 1970. But the appellant did not specifically urge the right available to him on the strength of the entry in the Record of Tenancy Rights Register prior to the disposal of the suit in O.S.No.534 of 1970 under Exhibit B-1 on 16-2-1973. To such a situation, Explanation IV to section 11, Code of Civil Procedure, would squarely stand attracted so that the appellant cannot be heard now to contend that some rights have been secured on the strength of the entry in the Record of Tenancy Rights Register and they can be enforced in the course of a subsequent suit based more or less the very same claims as were agitated and negatived in the prior suit. Looked at even from a broader perspective, it is obvious that the appellant was agitating in the course of O.S.No.534 of 1970 rights as a cultivating tenant. The particular source to which he was able to trace those rights asserted in the course of that suit was not really material. In essence, in O.S.No.534 of 1970, the appellant was asserting rights as a cultivating tenant on the footing that he was a lessee of the disputed property belonging to the respondent and Exhibit A-1, the entry in the Record of Tenancy Rights Register, produced in this case merely lent evidentiary support to that

claim. It was necessary for the Court in disposing of such a claim to adjudicate upon the status of the appellant as well as his claim to rights as a cultivating tenant and precisely this was done by the lower appellate Court and this Court holding that the appellant was not a cultivating tenant at all, but was only a licensee of the usufructs in the coconut thope with no rihgts whatever in the soil. The rights projected by the appellant in the earlier suit and in this suit are the same, namely, rights as a cultivating tenant and the appellant had failed in the earlier suit in establishing such rights. Earlier, it has been pointed out how the mere entry in the Record of Tenancy Rights Register would not clothe the appellant with rights as a cultivating tenant and, therefore, the circumstance that the entry under Exhibit A-1 had come into being on 11-10-1972 cannot be availed of by the appellant to claim the same rights, which had been negatived by the earlier adjudication of this Court. Vide *Venkata Seshayya v. Kotiswara Rao*, L.R.64 I.A. 17= (1937)1 M.L.J. 113= I.L.R. (1937) Mad.263= A.I.R.1937 P.C.1. Thus, having regard to the avowed object of Tamil Nadu Act 10 of 1969 and the effect of an entry made in the Record of Tenancy Rights Register under its provisions, the appellant cannot be permitted to reagitate rights as a cultivating tenant negatived earlier purporting to do so on the basis of the entry under Exhibit A-1. Looked at from any point of view, the applicability of section 11, Code of Civil Procedure, or that of Explanation IV to section 11, Code of Civil Procedure, in this case cannot be ruled out.

6. That leaves for consideration the objection raised by the learned counsel for the appellant regarding the competence of the District Munsif's Court, Kumbakonam, to deal with O.S.No.534 of 1970 on 16-2-1973, when the suit was disposed of, in the light of the introduction of section 16-A in Tamil Nadu Act 10 of 1969. An argument was raised that on and from 27-11-1972, the adjudication on the question of the status of a person as a cultivating tenant was exclusively within the jurisdiction of the authorities constituted under the provisions of the Tamil Nadu Act 10 of 1969 and in that sense the civil Court was incompetent to go into the question on 16-2-1973 which it did under Exhibit B-1. At first blush, this argument may appear to be attrative and acceptable. But this had been repelled in very clear terms by the decision of the Full Bench in *Periathambi Goundan v. District Revenue Officer*, (1980)2 M.L.J.89 @ 99: I.L.R. (1980)2 Mad.255= A.I.R.1980 Mad.180. In paragraph 29 of the decision of the Full Bench, the effect of the introduction of section 16-A with reference to suits instituted prior to the coming into force of section 16-A and subsequent to the introduction of that section has been dealt with. The Full Bench points out at page 99 as follows:

> ". . . a suit which has been instituted prior to the coming into force of section 16-A of the Act will have to run its natural and normal course prescribed by law without in any way being affected by the provisions contained in section 16-A of the Act, because there is nothing in section 16-A expressly or by necessary implication taking away the jurisdiction of the Civil Court validly and competently assumed at the first instance. Consequently even if a decree had not been passed in a suit at the time when section 16-A came into force, the fact that section 16-A came into force during the pendency of the suit will not prevent the Court from exercising its jurisdiction lawfully and validly invoked and the same principle will apply to the further course of the suit in the form of appeal or revision."

In this case, the suit in O.S.No.534 of 1970 had been instituted on 20.8.1970, long prior to the introduction and coming into force of section 16-A of Tamil Nadu 10 of 1969 on 27-11-1972. That would mean, according to the principle laid down by the Full Bench referred to above, the Court was

fully competent to deal with the questions agitated before it including that of the status of the appellant as a cultivating tenant. That the appellate Courts were also likewise competent to deal with such a question has also been pointed out by the Full Bench in the observations set out earlier. Therefore, the lower appellate Court as well as this Court in S.A.No.1332 of 1974 were quite in order in considering the claim of the appellant as a cultivating tenant and also in proceeding to negative the same. The adjudication of the trial Court in O.S.No.534 of 1970 and that of the lower appellate Court as well as this Court in S.A.No. 1332 of 1974 was thus quite in order and cannot be stated to have been given by a Court which was not competent to deal with and dispose of such matters.

7. There is no dispute that the respondent being a temple would be a public trust within the meaning of section 2(5) of Tamil Nadu Act 57 of 1961. Even assuming, as claimed by the appellant that he has secured rights as a cultivating tenant in respect of the property belonging to a public trust and would be a cultivating tenant under section 2(5) of Tamil Nadu Act 57 of 1961, section 51(iv) of that Act excludes the applicability of the provisions of the Act to lands converted into thopes. There is no dispute that the property in question is a coconut thope and, therefore, the appellant cannot be heard to agitate cultivating tenancy rights as against the respondent. Besides, as rightly pointed out by the lower appellate Court, there is no acceptable evidence to show that the appellant had been in possession and enjoyment of the property in dispute and had also raised punja crops therein. No doubt, the evidence discloses sale of coconuts by the appellant, but that would also be consistent with the prior adjudication of the status of the appellant as the licensee of the usufructs of the coconut trees. Under those circumstances, the appellant cannot claim that he is a cultivating tenant in possession of the disputed property and, therefore, his possession ought to be protected by granting an injunction in his favour. The lower appellate Court was quite correct in holding that by reason of the prior proceedings in O.S.No.534 of 1970 and the absence of any acceptable evidence to show the possession and enjoyment of the disputed property by the appellant as a cultivating tenant, he is not entitled to the relief prayed for by him in the suit. Consequently, the Second Appeal fails and is dismissed with costs throughout.

R.S. ---- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

Present:- *M.N.Chandurkar, C.J. and T.Sathiadev, J.*

*W.P.No.1235/83 and 1236/83. 1st *August, 1984.*

S.P.Sakthi Devi *Petitioner**

v.

The Collector of Salem and others *Respondents.*

(A) Constitution of India (1950), Articles 15(4), 335, 341, 342 and 226 - Scheduled Tribes - Reservation quota for jobs - Metropolitan Magistrate issuing caste certificate to a person belonging to Konda Reddy Community - Conclusive nature of - Indian Airlines, whether bound by such certificate.

(B) Evidence Act (I of 1872), sections 74 and 76 - Test for determining whether a document is a public document or not - Certified copy - Issue of - Not a test.

(C) General Clauses Act (X of 1897), section 21 - Power to make an order whether includes power to rescind order.

As to the effect of a Scheduled caste - Scheduled tribe certificate issued by a Metropolitan Magistrate, one of

the prescribed authorities under a circular dated 5-8-1975 issued by the Central Government relating to posts in the Central Government, Public Sector undertakings, statutory or semi government bodies etc, and whether a public sector undertaking etc, like the Indian Airlines can refuse to be bound by it and hold an independent enquiry,

Held:- When the Central Government had issued directions, as to how the Caste Certificates are be used and acted upon and particularly relating Scheduled Castes and Scheduled Tribes, the policy of the Government is not to cause undue hardship to them. In proving their 'case', it is just and proper to hold that, unless and until a caste certificate is cancelled, it is binding on all, the authorities/institutions, bodies and undertakings. *[Para.9]*

The certificate issued by the 18th Metropolitan Magistrate, Madras, being a competent authority to issue such a certificate, and it having not been cancelled, and the petitioner having satisfactorily established that she belongs to Konda Reddi Community, there is no warrant for any further enquiry to be held.

The following general directions were given by the High Court for guidance of all Courts and authorities:

1. A Caste-Community certificate issued by an empowered public anthority under seal continues to be a valid document till it is cancelled by the said authority or by his superior authority.

2. Their contents are to be treated as correct and every public authority, undertakings, bodies, institutions, etc, which are bound by instructions relating to such certificates, are bound to act upon them, so long as they are not cancelled.

3. In no disciplinary proceedings, the genuineness or correctness of their contents can be gone into. It is open to the department or employer or organisation, to ask the issuing authority or District Collector, as the case may be, to verify whether the certificate as issued could be still valid, on materials which have since come to their knowledge. They can appeal in the verification enquiry and place the materials.

4. If the certificate is cancelled, then disciplinary proceedings can be initiated for having furnished false information.

5. Appointing authorities have the right to verify the genuineness of the certificates by approaching the District Magistrate - Collector of the District or such other constituted authority and once the report is received that the certificate is genuine, thereafter the certificate-holder cannot be furthr harassed to prove his caste/community in any other manner.

6. In causing verification, the Collector is bound to follow the procedure laid down in letter dated 7th July, 1983 of the Government of Tamil Nadu.

7. In view of what is stated in Chapter 19 of Brochure on Reservation for Scheduled Castes and Scheduled Tribes, in services, 6th edition (1982), the instructions issued by the Central Government from time to time relating to Scheduled Castes and Scheduled Tribes, pertaining to issue of caste certificates are binding upon public sector undertakings, statutory and semi-government bodies and voluntary agencies receiving grant-in-aid from the Central Government, as provided therein. *[Para.10]*

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue writs of *certiorari* calling for the records in W.P.1235/83 and to call for the records of the 4th respondent herein in his reference MFD/OPS/PP/466 dt. 4.2.83 and calling for the report of the 1st respondent said to have been sent by him to the 4th respondent as

referred to by this 4th respondent (in his show-cause notice MDS/OPS/PP/466 dt. 4.2.83 on the file of the 4th respondent.

T.S.Subramaniam for *N.Kannadasan* and *K.Elango*, for Petitioner.

J.Kannadasan, Addl. Govt. Pleader, for Respondents 1 to 3.

N.G.R.Prasad, for 4th Respondent.

The Order of the Court was mady by

Sathiadev, J.:- The petitioner in these petitions claims that she belongs to Scheduled Tribe-Konda Reddy and that she had obtained a caste certificate to that effect from the Head Quarters Deputy Tahsildar, Sankari on 5.6.1976. She was appointed as an Air Hostess in Indian Airlines under the quota reserved for Scheduled Tribes. At that time, she secured a certificate from the 18th Metropolitan Magistrate, Saidapet, Madras in the form prescribed under circular issued by the Central Government relating to posts/services in the Central Government and in Public Sector Undertakings, Statutory and Semi-Government Bodies, and voluntary agencies receiving grants in aid from the Central Government. She came to know that the fourth respondent-Indian Airlines had sought for verification regarding the genuineness of the caste certificate. The first respondent-Collector of Salem had initiated enquiry proceedings through his subordinate officers. On 19.11.1981, the Revenue Inspector came to the village and conducted an enquiry in which statements were obtained from the petitioner's father and ten other persons. All of them gave statements in support of her claim. Again in December, 1981, the third respondent-Tahsildhar, Sankari conducted an oral enquiry in the presence of the Revenue Inspector, and here again, the persons who have appeared before him have deposed in her favour. Again in January, 1982, when the second respondent-Sub-Collector, Sankari came for holding an enquiry, nearly ten persons were examined, and they also supported the petitioner's claim. On her behalf, nine documents were produced. She was made to understand that respondents 2 and 3 have sent reports to the first respondent stating that she is a Konda Reddy. On coming to know that her paternal uncle Mr.K.M.Raju, out of jealousy and family feud, had submitted a petition to the first respondent stating that she does not belong to Konda Reddy, her father sent a petition to the first respondent to the effect that if his inimical brother is examined, the petitioner should also be permitted to participate in the enquiry. In spite of being made aware of these factors, the first respondent had written on 1.12.82 to the fourth respondent, stating that the petitioner does not belong to Konda Reddy community, which had resulted in the fourth respondent issuing a show cause notice on 4.2.1982 calling upon her to submit her representations against the proposal to take disciplinary action against her. Challenging this proceedings, W.P.No.1236 of 1983 is filed. W.P.No. 1235 of 1983 is filed to quash the report of the first respondent dated 1.12.1982.

2. On behalf of the petitioner, it is contended that when a valid certificate had been secured from the 18th Metropolitan Magistrate, Madras, who is one of the prescribed authorities authorised to issue a caste certificate as per the letter of the Central Government dated 5.8.1975, the fourth respondent being an instrumentality or agency of the Central Government and wholly owned by it, is bound to act upon such a certificate, unless and until the said certificate is cancelled. On the approach made by the first respondent, it is stated that in spite of himself being put on prior notice that the petitioner's paternal-uncle out of family fued had come forward with a false complaint, his statement had been relied upon for the impugned report, and that she was not afforded a fair opportunity of rebutting this claim. She states that in spite of all the efforts taken to produce several materials before respondents 2 and 3,

who in their turn had, forwarded their reports in her favour, the first respondent had deliberately avoided referring to those materials, but forwarded a cryptic report to the fourth respondent relying upon the statements given by her sworn enemies.

3. On behalf of the fourth respondent, Mr.N.G.R.Prasad, learned counsel, strenuously pleads that the fourth respondent has the necessary disciplinary jurisdiction to hold an enquiry and decide whether the caste certificate relied upon by the petitioner is genuine or not. He submits that no valid cause has been made out to stall the fourth respondent from conducting an enquiry irrespective of whatever be the reports that may be submitted by the Collector or other Revenue Authorities. Having come across certain materials, it cannot be prevented from taking a decision about the correctness of the certificate, irrespective of the fact whether the certificate already issued by the competent authority is cancelled or not.

4. In W.A.No.783 of 1982, this Court held that G.O.Ms.No.1139, Social Welfare, dated 23.3.1982 issued by the Government of Tamil Nadu would be applicable only in respect of caste certificates required for its purposes and not in respect of caste certificates required to be produced for posts in the Central Government. A contention is raised to the effect that the fourth respondent and similarly placed Public Sector Undertakings, Nationalised banks and other instrumentalities or agencies of the Central Government have the right to decide, whether the caste certificates issued by the authorities alone could be acted upon, irrespective of whatever be the directives of the Central Government as found in its letter dated 5.8.1975, read with earlier instructions. In Chapter XIX of the Brochure on Reservation for Scheduled Castes and Scheduled Tribes in Services, 6th Edition (1982) at Page 286 (hereinafter referred as the Brochure) it is stated thus:

"19.1 The various instructions given in this Brochure relate to reservations for Scheduled Castes and Scheduled Tribes in posts/services under the Government. The Public Sector Undertakings, Statutory and Semi-Government Bodies etc, under the control of the Government, have also been asked to make reservation for Scheduled Castes and Scheduled Tribes in their services on the lines of the reservations in services under Government by separate instructions as mentioned in the following paragraphs."

Paragraph 19.2 deals with the directives forwarded by the Bureau of Public Enterprises to the administrative Ministries for issue to the Public Undertakings. One of the innumerable instructions given in the Brochure relates to how and in what manner caste certificates are to be obtained, and as to which of the authorities are authorised to issue them. A Presidency Magistrate is one such authority. When instructions issued by the Central Government relating to Scheduled Castes and Scheduled Tribes are binding on its Public Sector Undertakings and even voluntary agencies receiving grants-in-aid from the Central Government, the plea raised by more than one Counsel appearing on behalf of Nationalised Banks and their Recruitment Board, Indian Airlines and like institutions that they are not bound by the instructions issued by the Central Government in this regard, has to be necessarily rejected. They have no right to make a choice and claim that they would accept the certificate issued only by one of the prescribed authorities or any authority other than what have been prescribed by the Central Government.

5. The next contention is that, a caste certificate is not a public document and it is only a communication reflecting the statement of facts and hence, irrespective of whether the issuing authority or the Collector/District Magistrate in the District had cancelled it or not, it is open to the employer to hold an enquiry and decide about the correctness of the certificate, and further pursue with the disciplinary

proceedings against the concerned personnel. The caste certificate is issued by a public authority authorised to issue it, after holding an enquiry, as circumstances may warrant. It is a public duty to be discharged by a public servant, or authority conferred upon him to issue such a certificate. The contention on behalf of the fourth respondent and by the Central Government Standing Counsel is that, a caste certificate is not conclusive of what is contained therein, and the employer has the jurisdiction to decide upon the correctness of the claim made therein, by calling upon the certificate-holder to adduce evidence in support of the contents of the certificate, and failing which, suitable action could be taken against the certificate-holder. In support of the claim that it is not a public document, it is stated that when a certified copy could not be secured of the records relating to issue of caste certificate, it would not come within the definition of "public document" under section 74 of the Evidence Act. This contention lacks strength because section 76 of the Evidence Act takes care of the nature of documents in respect of which alone certified copies could be obtained. Hence, this aspect cannot be a determinative factor to hold as to whether a caste certificate is a public document or not. What is paramount is to find out whether in the course of discharge of public duties, the concerned public authority is enjoined to discharge the public duty, and if so, then the document which comes into existence consequent to such public duties, issued with seal and authority of his Office would be a public document. Once a caste certificate comes into existence in this form any other public functionary is duty bound to act upon the same. On being issued, it is a lawful and valid document. So long as, it is not cancelled in the eye of law, it being a valid document, the holder of it, could rely upon it to establish his caste. Except the prescribed authority, no other authority or public bodies or undertakings etc. having been conferred with powers to issue caste certificates, he cannot choose to declare in any proceeding, that the valid caste certificate contains false particulars. Further, in G.O.Ms.No.9, Social Welfare dated 3.1.1983, instruction were given that records of local enquiry must be maintained as a permanent record for verification in future, which is also indicative of the fact that caste certificate is a public document. Hence, it is held that a caste certificate is a public document.

6. The next point taken is, when the power to cancel a caste certificate has not been conferred on empowered authorities, there is no need for the concerned employer to await till the concerned authority cancels the certficate, and only thereafter take a decision about the correct caste of the candidate or employee or servant. Under section 21 or the General Clauses Act, a power to make an order includes the power to rescind it. Hence, the empowered authorities who had brought into existence the lawful and valid caste certificate or his higher authority alone could cancel a caste certificate Unless and until it is done, all public authorities in Central Government and Public Sector Undertakings and bodies etc. which are under its control are bound to treat the contents of such certificate as correct.

7. Yet another contention taken is, in spite of becoming aware of the falsity of such certificate, they would be compelled to keep those certificate-holders in service employment in spite of powers vested in them to initiate disciplinary proceedings and that such a situation should not be allowed to exist. Here again, this argument overlooks the enablement provided in Chapter XIV to verify the correctness of caste certificate if deemed necessary. Paragraph 14.3 in Chapter XIV enables an appointing authority if it considers necessary for any reason to verify the claim of a candidate through the District Magistrate of the place where himself or his family ordinarily resides. Hence, at the time of remand itself in such of those cases wherein

any doubt is entertained, an opportunity is to be given to vouchsafe the correctness or genuineness of the certificate. Irrespective of the several categories of empowered authorities, if the question of verification arises, a highly responsible authority being the District Magistrate-Collector, is authorised to verify the correctness of the certicate. This court considers that the Central Government after considerable care had chosen only responsible authorities, on whom the concerned Governments have disciplinary control, to issue such of those cases where a verification is necessary, to ascertain the correctness of the certificate, no prejudice is caused to recruiting bodies in acting upon such authorised caste certificates. Furthermore, if after remand had been made, circumstances warrant a verification to be made and if it is proved that the candidate's claim is false, then his services may be terminated in accordance with the relevant rules/orders. This being sufficient safeguard provided to act upon caste certificates, the concerned employer cannot insist upon taking a decision regarding the correctness of the caste certificates in disiciplinary proceedings.

8. On the contention that for a false representation made or for filing a not genuine document in support of employment, the power vests in the appointing authority to initiate disciplinary proceedings, and therefore, in the said proceedings, the disciplinary authority has the right to decide whether a caste certificate is genuine or not, it has to be held that that, it being a public document authorised to be issued with seal, and the empowered authority, having the jurisdiction to rescind it if it is found to be incorrect, and added to all these, in deserving cases, when the Collector could be called upon to verify about their genuineness, and in such an enquiry, the concerned authority could place whatever materials it had come across and once it is determined by the Collector that the contents of the certificate are true and correct, thereafter the same could not be subjected to any further enquiry in a disciplinary proceeding. If the Collector cancels the certificate, undoubtedly, on the basis of such a report, disciplinary action could be taken to terminate the services of the certificate-holder. This is precisely stated in paragraph 14.3 in Chapter XIV.

9. When verifications are called for, as to what procedure is to be followed the Government of Tamil Nadu in letter dated 7.7.1983 had stated that a Collector can cancel a community certificate issued by a subordinate officer when it is found to be false. As to what he had to do under such circumstances, clear-cut directives having been issued, the recruiting agency or bodies/institutions etc. will have to look to the Collector regarding the genuineness or otherwise of the certificate. The procedure followed by him having been specifically stated and the consequences which would fall not only on the candidate but also on the issuing authority, if the caste certificate is proved to be false, there is absolutely no scope to accept the contention of some of the counsel appearing for these bodies that the empowered authorities would act in an irresponsible manner. When the Central Government had issued directives as to how these caste certificates are to be issued and acted upon, and particularly relating to Scheduled Castes and Scheduled Tribes, the policy of the Government is not to cause undue hardship to them. In proving their caste, it is just and proper to hold that, unless and until a caste certificate is cancelled, it is binding on all concerned authorities/institutions/bodies/undertakings etc.

10. As for the petitioner, she filed not only a certificte issued by a Deputy Tahsildar but also by the 18th Metropolitan Magistrate, Madras. Her S.S.L.C. Certificate states that she belongs to Scheduled Tribe. The Headmaster of Government High School, Sinnappampatti has certified that she belongs to Indian-Hindu-Konda Reddy. The sale deed dated 30.12.1926 in favour of her grand-

father mentioning therein the words "Konda Reddy" was produced. This was executed on a stamp of that year. It was no registered. Several persons examined by respondents 2 and 3 have stated that her father is a Konda Reddy. The Collector of Ramnad in his circular, taking note of the attitude of the subordinate officers being reluctant to issue community certificates in respect of Konda Reddy Community, had stated that even if no documentary evidence is available, sworn-affidavit by the person/parent/guardian in stamp paper with two respectable persons stating about community may be obtained. Certifying authority can make enquiry and verify with villagers concerned and the community people before issuing the certificate. Now in this case, several persons have supported the claim of the petitioner. In spite of such materials existing, the first respondent had relied upon the allegation made in the petition filed by K.M.Raju, the paternal-uncle of the petitioner, who had himself stated that between himself and the father of the petitioner, due to partition dispute, they are not on talking terms. The other complainant is P.Radhakrishnan, who is the son of the petitioner's aunt. Except the oral claims made by them, they had not produced any contra documentary evidence to dislodge the reliance placed by the petitioner on the basis of ancient documents etc. The Tahsildar, Sankari- the third respondent in his report dated 10.12.1981 had stated that the villagers have given sworn statements and since the sale deed of 1926 specifically refers to Konda Reddy, the petitioner belongs to the said caste. The second respondent-Sub-Collector, who is an I.A.S.Officer, after considering all details not only of the contents of documents, but also the claims made by all deponents had come to the conclusion that there is overwhelming evidence in support of the claim of the petitioner. In spite such materials and reports existing, the first respondent who had already issued a circular that Konda Reddy Community is non-existent in Salem District, had chosen to rely on oral claims made by two complainants, who are close relations of the petitioner and who are admittedly inimical towards her and there being total absence of consideration of the contents of the reports submitted by respondents 2 and 3 and the materials produced by the petitioner, the impugned communication of the first respondent dt. 1.12.1984 is illegal, as the conclusion arrived at therein is obviously perverse. As pointed out by the Sub-Collector, when overwhelming evidence exists in support of the claim of the petitioner, it is fruitless to remit the matter for passing fresh orders as claimed by the counsel for the first respondent. The certificate issued by the 18th Metropolitan Magistrate, Madras being a competent authority to issue such a certificate, and it having not yet been cancelled, and the petitioner having satisfactorily established that she belongs to Konda Reddy Community, there is no warrant for any further enquiry to be held. But for the illegal and invalid communication of the first respondent, the fourth respondent would not have issued the impugned show-cause notice. Now that it is held that the petitioner is a Konda Reddy and the certificte of 18th Metropolitan Magistrate being a valid certificate, the fourth respondent cannot further proceed against the petitioner as if she had produced a false certificate. Hence, it is held that:

1. A Caste/Community Certificate issued by an empowered public authority under seal continues to be a valid document till it is cancelled by the said authority or by his superior authority.

2. Their contents are to be treated as correct and every public authority, undertakings, bodies, institutions, etc. which are bound by instructions relating to such certificates, are bound to act upon them, so long as they are not cancelled.

3. In no disciplinary proceeding. their genuineness or correctness of their contents can be gone into. It is open to the department or employer or organisation, to ask the issuing authority

or District Collector, as the case may be, to verify whether the certificate as issued could be still valid, on materials which have since come to their knowledge. They can appear in the verification enquiry and place the materials.

4. If the certificate is cancelled, then disciplinary proceedings can be initiated for having furnished false information.

5. Appointing authorities have the right to verify the genuineness of the certificates by approaching the District Magistrate-Collector of the District or such other constituted authority, and once the report is received that the certificate is genuine, thereafter the certificate-holder cannot be further harassed to prove his caste/community in any other manner.

6. In causing verification, the Collector is bound to follow the procedure laid down in letter dated 7.7.1983 of Government of Tamil Nadu.

7. In view of what is stated in Chapter XIX of Brochure on Reservation for Scheduled Castes and Scheduled Tribes in Services, 6th Edition (1982), the instructions issued by the Central Government from time to time relating to Scheduled Castes and Scheduled Tribes, pertaining to issue of caste certificates are binding upon public and voluntary agencies receiving grands-in-aid from the Central Government, as provided therein.

11. For the reasons stated above, both the writ petitions are allowed with costs payable by the first respondent. Advocate's fee Rs.250/- one set.

R.S. ---- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction)

Present:- *S.Natarajan and K.Venkataswami, JJ.*

*L.P.A.No.32 of 1977. *8th March*, 1984.

A.Subramanian Asari *Appellant**

v.

Jayadevan Nair and others *Respondents.*

Hindu Law - Alienation - Suit for partition and possession - Concerned property in possession of alienee - Alienation made by adult members of tarwad - Major portion of consideration paid for purchasing other properties - Impugned alienation though found not to be for necessity if sustainable as an act calculated to benefit the family even in the absence of purchase of other property - Nature of burden of proof cast on alienee.

Held:- There is a marked difference betwen cases where the sale of a property belonging to a Joint Hindu family is effected for purposes of necessity on the one hand and for purposes of family benefit on the other. In the former case, all that the alienee will have to prove is the existence of the necessity which impelled the vendor to effect the sale. It is not obligatory on him to prove that the necessity was fulfilled in accordance with the recitals contained in the sale deed. That is because the alienee cannot effectively control and direct the actions of the vendor. *[Para.9]*

While in the case of alienation for family necessity, it can be upheld even if the sale consideration had not been utilised, with regard to an alienation for purpose of family benefit, the alienee has to prove that the sale consideration has been actually utilised for the purpose for which the sale was made for the benefit of the family and in the absence of such evidence the

alienation cannot be taken to be beneficial to the family. *[Para.11]*

Cases referred to:-

Muthuswami Pillai v. Sandana Velan, (1927)53 M.L.J.218= A.I.R.1927 Mad.649; *Radhakrishnadas v. Kaluram*, (1963)1 S.C.R.648= A.I.R.1967 S.C.574; *Sri Krishna Das v. Nathu Ram*, (1927)54 I.A.79= 52 M.L.J.720= A.I.R.1927 P.C.37; *Niamat Rai v. Din Dayal*, (1927)54 I.A.211= 52 M.L.J.729= A.I.R.1927 P.C.121; *Sengoda Goundan v. Muthuvelappa*, (1955)2 M.L.J.331= A.I.R.1955 Mad.531; *Krishnaswami Naidu v. Velumani*, (1974) T.L.N. J.139.

Appeal under Clause 15 of the Letters Patent against the Judgment and decree of Mr.Justice Ramanujam dated 20-10-1976 and made in the exercise of the ordinary civil jurisdiction of the High Court in Appeal No.36 of 1970, preferred to the High Court against the decree of the District Court, Kanyakumari at Nagercoil dated 22-9-1969 and passed in O.S.No.9 of 1968.

N.Thiagarajan, for Appellant.

G.S.Thamby, for Respondents.

The Court made the following

ORDER:- This appeal under Letter Patent has been filed against the Judgment of a learned single Judge of this Court in A.S.No.36 of 1970, wherein the learned Judge has confirmed the findings of the trial Judge, that in so far as the purchase of items 10, 11, 35 and 37 of the suit properties by the 9th defendant they were not supported by tarwad necessity. Aggrieved by this Judgment, the 9th defendant has preferred this appeal.

2. Plaintiffs respondents 1 to 3 herein filed O.S.No.9 of 1968 on the file of the District Judge, Kanyakumari at Nagercoil, parying for partition and separate possession of their share in the tarwad properties. In seeking the relief of partition, they assailed the alienations of several items of tarwad properties effected by the adult members during their period of minority. The trial Judge sustained the case of the plaintiffs and found that they would be entitled to a 3/10 share in the suit properties and consequently, granted a decree for partition in respect of that share.

3. Against the Judgment of the trial Court, defendants 7, 9, 18, 23, 24, 28, 29, 30, 32, 40, 42 to 44, 34 and 20 preferred A.S.No.36 of 1970, which was heard by Ramanujam, J. Two contentions were raised before the learned Judge; one of them was that a partition had taken place between the branches of the tarwad in the year 1958 under Exhibit A-15 and by reason of that partition, the plaintiffs will not be entitled to claim partition of and challenge the alienations of other items of properties, which have not been awarded to the share of their sub-tarward, under Exhibit A-15. Ramanujam, J. accepted the contention and held that a distinction has to be made between the pre-partition alienations and the post-partition alienations, that in respect of pre-partition alienations, the plaintiffs can challenge the same on the ground that the alienations are not for tarwad necessity and that in respect of the post-partition alienations, they can challenge them only if the alienations related to the properties allotted to them. The second contention before the learned Judge related to the merits of the defence put forward by the various alienees in justification of the sales effected to them. For the purpose of this appeal, we are only concerned with the case put forward by the 9th defendant, who, as already stated, is the appellant herein. As has been mentioned above, the 9th defendant had purchased items 10,11,35 and 37 under Exhibit A-5 sale deed. The consideration for these four items of properties is 10500 fanams. It was recited in Exhibit A-5 that 3000 fanams were to be paid for obtaining the release of a mortgage from one Arulanandam, that 1150 fanams were reserved for redeeming a mortgage of

item 5, 285 fanams were reserved for redeeming a mortgage of item 35, and the balance of 6065 fanams was paid in cash 'for the purpose of acquiring properties', in the names of the vendors and the minors. While the plaintiffs contended that the sale under Exhibit A-5 had not been effected for consideration and tarwad necessity,' the 9th defendant set up a defence that the sale had been effected for tarwad necessity and therefore, the alienations in his favour were binding on the minors and they could not be set aside.

4. After considering the documentary and oral evidence in the case, the trial Judge held that items 10 and 35 had been redeemed in accordance with the recitals in Exhibit A-5 however there was no proof that 3000 fanams had been paid for redeeming the mortgage in favour of Arulanandam and that there was also no proof that 6065 fanams intended for purchase of other properties had been paid to the vendors. There appears to be a mistake in the finding rendered by the learned trial Judge, because the plaintiffs had not let in evidence to prove that 6065 fanams had not been paid to the vendors on the date of sale. Evidence had been let in only to show that 3000 fanams reserved for discharge of the mortgage in favour of Arulanandam had not been paid and that had led to the mother of the plaintiffs filing a suit, O.S.No.670 of 1953 on the file of the District Munsif, Padmanabapuram for recovery of the balance of the sale price due under that head. It is borne out by records that the suit had been subsequently compromised. The learned trial Judge has held that there was collusion between the 9th defendant (appellant herein) and the guardian of the minors, and hence Exhibit A-5 sale deed cannot be held to have been executed for consideration or tarwad necessity. He therefore held that the sale is liable to be set aside and accordingly granted the relief of partition to the plaintiffs.

5. While disposing of A.S.No.36 of 1970, Ramanujam, J. has observed as follows:-

"It has been found on evidence by the court below that though the alienee undertook to obtain the release of the mortgage from Arulanandam, the mortgage was not in fact released and that the plaintiff's mother later had to file a suit for realising that amount but the suit came to be settled out of court. It has not also been shown by the alienee that any property has been purchased for the tarwad with 6065 fanams alleged to have been paid to the vendors. It has been proved that the two mortgages for which the balance of consideration is said to have been utilised had been redeemed. Therefore, on these facts, the lower court found that Exhibit A-5 sale also cannot be held to be supported by tarward necessity. I have no reason to disagree with the finding of the court below as regards these items."

6. Mr.Thiagarajan, learned Counsel for the appellant contends that the finding of the learned single Judge" that the redemption of the two mortgages, for which the balance of consideration is said to have been utilised, has not been proved", is not a correct finding, because the trial Judge has rendered a finding on that matter in favour of the 9th defendant. We are inclined to sustain this contention, because we find that the trial Judge has in fact rendered a finding that 1150 and 285 fanams had been utilised for the discharge of mortgages over items 10 and 35, respectively.

7. The next submission of Mr.Thiagarajan is that 3000 fanams reserved for obtaining the release of the mortgage from Arulanandam should also have been paid by the 9th defendant at a subsequent point of time. In support of this plea, the counsel points out that the mother of the plaintiffs had filed a suit, as borne out by Exhibit P-97, for recovery of money due under this head. The suit had been subsequently compromised and the counsel would say that the mother would not have entered into a compromise unless she had been paid the sum of 3000 fanams, which had to be paid by the vendee for obtaining

the release of the mortgage from Arulanandam. On the other hand, the respondent's counsel would say that when the trial Judge has given a finding that there has been collusion between the 9th defendant and the plaintiffs' mother, the Court cannot attach any weight to the compromise entered into between the parties in O.S.No.670 of 1953. For purpose of this appeal, We do not think it necessary to go into the question whether the 9th defendant had discharged his obligation of paying 3000 fanams by having the amount paid to the plaintiffs' mother when she filed the suit for the ultimate purpose of getting a release of the mortgage executed in favour of Arulanandam.

8. We will proceed on the basis that the stand taken by the appellant in this behalf is also sustainable. Even then, we have to see whether the sale effected under Exhibit A-5 is legal and valid and sustainable in law. As we have stated above, the major portion of the consideration, *viz*. 6065 fanams is said to have been paid to the vendors for the purchase of other items of properties in the names of the vendors and the minors. There is no evidence in the case to show that other items or items of properties had in fact been purchased by the vendors in compliance with the recitals contained in Exhibit A-5. Now the question for consideration is, whether in the absence of proof of purchase of other items or items of properties, the 9th defendant can seek to justify the sale in his favour on the ground of tarwad necessity. Ramanujam, J. has held that since the 9th defendant has not shown that any property had been purchased for the tarwad necessity with 6065 fanams mentioned in Exhibit A-5, the sale cannot be said to have been effected for tarwad necessity. Mr.Thigarajan, assails the finding of the learned Judge on this aspect of the matter and states that it is not possible for alienee to exercise control or supervision over the alienor and see to it that another item of property was purchased from out of the sale consideration and such being the case, it will not be just to hold that since the alienee has not proved the purchase of property by the vendor, the sale transaction in his favour should fail on the ground that it was not for tarwad necessity or the benefit of the family. In support of this contention, Mr.Thiagarajan invited our attention to *Muthuswami Pillai v. Sandana Velan*, (1927)54 M.L.J.218: A.I.R.1927 Mad.649. In that case, a father sold an item of property for Rs.2,000/- and it was mentioned in the sale deed that the sale transaction was being entered into for the beneficial purpose of the family, *viz*, to purchase a more productive land than the one that was sold. It was however found that no such land was in fact purchased and the minors, who questioned the alienations, were not benefited by the transaction of sale. Even so, a Bench of this court accepted the finding of the Subordinate Judge that the sale transaction had been entered into with intent to benefit the family and therefore, the finding on the issue "whether the sale was an act calculated to benefit the family?' should be found in favour of the alienee. We do not derive any light from this Judgment because it has been rendered with reference to the peculiar facts of that case.

9. Mr.Thiagarajan then cited *Radhakrishnadas v. Kaluram*, (1963)1 S.C.R.648= A.I.R.1967 S.C.574 . In that case, the question was whether a sale of joint family property for Rs.50,000/- could be sustained when the sale was justified by necessity only to the extent of Rs.45,000/-. The argument put forth before the Supreme Court was that for the balance of the sale price of Rs.5,000/- legal necessity had not been established and therefore, the sale transaction was liable to be set aside. The Supreme Court referred to the judgments of the Privy Council in two cases, *viz*, *Sri Krishna Das v. Nathu Ram*, (1927) 54 I.A.79= 52 M.L.J.720: A.I.R.1927 P.C.37 and *Niamat Rai v. Din Dayal*, (1927) 54 I.A.211= 52 M.L.J. 729= A.I.R.1927 P.C.121 and held as follows:

"It is well established by the decisions of the courts in India and the Privy Council that what the alienee is required to establish is legal necessity for the transaction and it is not necessary for him to show that every bit of the consideration which he advanced was actually applied from meeting family necessity."

Though this decision lends apparent force to the contention of Mr.Thiagarajan, we find that the ratio cannot be applied to this case, because there is a marked difference between case where the sale of a property belonging to a joint Hindu family is effected for purposes of necessity on the one hand, and for purposes of family benefit on the other. If the sale had been effected for the purpose of necessity, then all that the alienee will have to prove is the existence of the necessity, which impelled the vendor to effect the sale. It is not obligatory on him to prove that the necessity was fulfilled in accordance with the recitals contained in the sale deed. This is because of the fact that the alienee cannot effectively control and direct the actions of the vendor. The Privy Council has observed in *Sri Krishnan Das v. Nathu Ram*, (1927) 54 I.A.79= 52 M.L.J.720= A.I.R.1927 P.C.37, as follows:

" . . . the alienee can rarely have the means of controlling and directing the actual application of the money paid or advanced by him unless he enters into the management himself".

10. On the other hand, we have another line of dicisions, where the obligation of the alienee to prove the application of the sale price for purposes intended for the benefit of the family, has been set out. We may only cite a Bench decision of this Court in *Sengoda Goundan v. Muthuvelappa Goundan*, (1955)2 M.L.J.331: A.I.R.1955 Mad.531 in this behalf. In that case, the alienation of certain items of family properties was challenged on the ground that they were not supported either by necessity or for the benefit of the family. In respect of certain alienations, the alienee could not prove that the sale was supported by necessity, Therefore, an alternate plea was taken that the sale was intended for the benefit of the family. But the alienee was not able to prove that the sale price had been used for the purpose of another item of property for the benefit of the family. Taking note of that fact, the Bench held as follows:

"In the absense, therefore, of any proof or utilisation of the sale proceeds in the purchase of other property for the family, we must hold that the alienations were not for the benefit of the family . . . We agree with Subba Rao, J. that the alienations were not for the benefit of the family and therefore were not binding on the plaintiff."

Therefore, the view taken by Ramanujam, J. that since the 9th defendant had not proved the utilisation of 6065 fanams for purchase of another item of property for the benefit of the family, the sale cannot be held valid, is fully in accordance with law.

11. We may also refer to a judgment of Ramanujam, J. in *Krishnaswami Naidu v. Velumani and others*, (1974) T.L.N.J. 139 where the learned Judge has held that in case of alienations for family necessity, the alienation can be upheld even if the sale consideration had not been utilised as was expected of the manager at the time of entering into a transaction, as the alienee need not look to the proper application of the sale proceeds; but with regard to alienations for purpose of family benefit, the alienee has to prove that the sale consideration was actually utilised for the purpose of purchasing other lands for the benefit of the family and in the absence of such evidence, the alienation cannot be taken to be beneficial for the family.

12. Mr.Thiagarajan then contended that the plaint does not proceed on the basis that the sale was not for the benefit of the family, but it proceeds on the basis that the sale was not for

consideration and tarwad necessity. Hence, he would say that since 4435 fanams have been utilised for discharging three mortgages it must be held that the sale was for tarwad necessity. We are unable to accept this contention. We may refer to Regulation 25 of the amended Nair Regulation, 1100 which governs the parties where it is stated as under:

> "Except for consideration and Tarwad necessity and with the written consent of all the major members of the Tarwad, no Karnavan or other managing member shall sell Tarward immovable proerty or mortgage it with possession for a period of more than twelve years."

Therefore, the regulation would also take in a case of a sale, where a major portion of the sale consideration is not for tarwad necessity, but for the purpose of benefit for the family. For the aforesaid reasons, we are in complete agreement with the view taken by the learned Judge about Exhibit A-5 sale not being binding on the plaintiffs. Consequently, we affirm the judgment of the learned single Judge with reference to the 9th defendant's case and dismiss the appeal. However, there will be no order as to costs.

R.S. ---- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *P.R.Gokulakrishnan, J.*

*C.R.P.No.3 of 1984. 31*st July*, 1984.

T.P.Rathinam Pillai, S/o. Perianna Pillai, No.147, Thanjavur Road, Tiruchirapalli *Petitioner**

v.

S.K.Mohammed Kasim, S/o Khader Ibrahim Rowther, No.22, Palakarai Main Road, Tiruchirapalli *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (18 of 1960), as amended by Act (XXIII of 1973), section 10(2)(i) - Wilful default - What is - Every default not a wilful default - Tenant taking all steps to pay the rent - No wilful default.

Held:- The facts and circumstances of each case have to be taken note of before coming to the conclusion that the tenant has committed wilful default in the payment of rent. *[Para.12]*

In this case the attempts made by the petitioner for paying the rents and also protecting his interest are evidenced by the various documents and they clearly establish that the petitioner was anxious to pay the rents and he had taken the necessary steps to protect his interest and that of the landlord who is the respondent herein. On the other hand it is patent that the respondent is trying his best to find out some menas by which he could victimise the petitioner on one ground or other so that he can evict him from the shop under his occupation. *[Para.8]*

Even if there was wrong adjustment of the property tax towards the payment of rent and the deposits into court and in Saving Bank were made once in two or three months on certain occasions, that may be a default, but cannot by any stretch of imagination be a wilful default. The facts clearly establish the oblique motive of the landlord to get the tenant evicted somehow or other. Both the Courts below have completely failed to appreciate the documents while deciding as to whether the tenant has committed wilful default in payment of rent or not.

Cases referred to:-

Jagannatha Chettiar v. Swarnambal, (1984)2 M.L.J.6= 97 L.W.182; *G.Rangaraju v . Parthasarathy* , (1964) 1 M.L.J.12; *Khivraj v. Maniklal*, I.L.R. (1966) 1 Mad. 431 = A.I.R.1966 Mad.67; *Rajappa v. Jumndoss* ,(1979) 1 M.L.J.. 317.

R.Alagar, for Petitioner.

K.Ramaswamy, for Respondent.

The Court delivered the following

JUDGMENT:- The tenant is the petitioner. The landlord who is the respondent herein filed R.C.O.P.No.307 of 1977 for getting an order of eviction on the ground of wilful default in the payment of rent from 1-7-1970 to 30-6-1977. It is the case of the petitioner herein that he became the tenant in the year 1930 and only subsequent to his tenancy, the respondent herein became the owner of the property in 1942. According to the petitioner, there is no question of any default much less wilful default in the payment of rents and that the calculations given by him in his counter statement will leave an excess of Rs.201.15 in the hands of the respondent herein. Both the authorities below found wilful default on the part of the petitioner herein and ordered eviction. It is as against these orders, the present civil revision petition has been filed by the tenant.

2. Mr.R.Alagar, learned counsel for the petitioner narrated the events from the year 1970 and submitted from the facts of the case that there is neither default nor wilful default on the part of the petitioner herein in the payment of rents. On the other hand, Mr.K.Ramaswamy, learned counsel for the respondent pointed out the adjustments made by the petitioner herein in respect of payment of property tax, submitted that this will amount to wilful default in the payment of rent and for this proposition, cited the decision of this Court in *Jagannatha Chettiar v. Swarnambal*, (1984)2 M.L.J.6= (1984) 97 L.W.182. Apart from this aspect of the case, Mr.K.Ramaswami learned counsel for the respondent submitted that even in the matter of deposit of rents both in the court and also at the post office savings account, the petitioner was not regular in deposit and that can be easily verified from the documents on record. I have been taken through the evidence, pleadings and the orders of the courts below.

3. In order to appreciate the facts and circumstances of this case and as to whether any wilful default has been committed by the petitioner herein, it is but necessary to state the events that finally culminated in the filing of R.C.O.P.No.307 of 1977.

4. In 1930, the petitioner, herein became the tenant. In 1942 the respondent herein became the owner of the suit property. It is the case of the petitioner that he went to Ceylon on a pilgrimage in 1970 after putting his brother-in-law one Panchanatham in charge of the shop in question. The said Panchanatham colluded with the respondent and brought about a registered lease deed dated 7-8-1970 as if the shop was leased to him by the respondent. That lease deed mentions a sum of Rs.100/- as the rent payable per month for the suit shop. The said Panchanatham filed O.S.No.1330 of 1970 on the file of the District Munsif's Court, Tiruchirapalli for an injunction restraining the petitioner herein from interfering with his possession. That suit was dismissed for default on 15-2-1972. It is seen from Exhibit B-23 that the respondent herein filed O.S.No.1985 of 1973 against the petitioner and Panchanatham for a declaration that Panchanatham is his tenant and the petitioner herein is the sub-tenant. On 9.1.1975 this suit was dismissed holding that the petitioner herein is a direct tenant under the respondent. Aggrieved by the said order, the respondent preferred an appeal A.S.No.294 of 1976 before the Sub Court, Tiruchy and the said appeal was also dismissed on 27-12-1976. Thus, it is clear from the above said facts that the petitioner has been recognised as the direct tenant under the respondent herein.

5. O.S.No.712 of 1976 is the suit filed by the respondent herein for arrears of rent from Panchanatham in which the petitioner was a party. On 23-8-1979 the said suit was dismissed. Even prior to this suit, the petitioner filed R.C.O.P.No.106 of 1971 praying for permission for depositing the rent into the court. The petitioner was driven to the necessity of filing this petition after sending five money orders as

evidenced by Exhibits B-1 to B-5 for the period from August 1970 to December 1970 and that was refused by the respondent herein. On 16-8-1973, R.C.O.P.No. 106 of 1971, was ordered and the petitioner was permitted to deposit the rents into the court of the Rent Controller. In R.C.O.P.No.115 of 1971, the respondent herein filed an eviction petition against Panchanatham and the petitioner herein on the ground of wilful default and sub-letting. That petition was dismissed as early as on 16-8-1973. As against the dismissal of this petition and also as against the direction in R.C.O.P.No.106 of 1971, the landlord filed C.M.A.Nos.248 and 249 of 1973. Both these appeals were dismissed on 11.4.1977 holding that there is no sub-letting nor any wilful default on the part of the tenant. As regards the direction to deposit the money, the appellate court upheld the order of the Rent Controller. No revision was filed as against these orders. The common judgment in C.M.A.Nos.248 and 249 of 1973 is evidenced by the document Exhibit B-22. In this judgment in which the respondent is the appellant, the court has specifically observed:

> "In the deposit application for six months rent of Rs.174/- at Rs.29/- per month Rs.87/- was deposited after adjusting the property tax paid."

This judgment further holds in categoric terms that the petitioner is the direct tenant of the respondent herein. After the dismissal of C.M.As.Nos.248 and 249 of 1973 on 11-4-1977, the respondent herein called upon the petitioner under Exhibit A-1 dated 9-5-1977 to pay rent from 1-7-1970 to 30-4-1977. Exhibit A-2 is the reply sent by the petitioner on 6-6-1977 giving the details of the amounts deposited in the post office savings account, the amount deposited in court and also the amount paid as property tax. Subsequent to this reply, the respondent herein filed R.C.O.P.No. 307 of 1977 alleging wilful default for the period from 1970 to 1977. The Rent Controller found that there is wilful default in the payment of rent from June 1972 to November 1972, from April, 1975 to June 1975 and from November 1975 to February 1977. After finding that there is wilful default for this period, the Rent Controller ordered eviction. The petitioner herein preferred R.C.A.No.103 of 1984. The Appellate Authority found that there is wilful default for the period from June 1972 to November 1972 and from November 1975 to February 1977. On this ground, the appellate authority dismissed the appeal. It is as against this order, the present civil revision petition has been filed.

6. As far as the period June 1972 to November 1972 is concerned, the records clearly prove that the rents for this period have been paid already. As regards rent from November 1975 to February 1977, there is a clear statement in the counter filed in H.R.C.O.P. No.307 of 1977 and that clearly makes out that there is an excess payment of Rs.201.15 by the petitioner herein, and as such there is no wilful default as alleged by the respondent herein. This statement filed by the petitioner in H.R.C.O.P.No.307 of 1977 is fortified by the document Exhibit B-9 which shows that a sum of Rs.87/- was deposited on 29-1-1976 to the credit of C.M.A.No. 248 of 1973. Exhibit B-10 shows that a sum of Rs.91.75 was deposited on 11-11-1976 to the credit of C.M.A.No.249 of 1973. Under Exhibit B-13, municipal tax of Rs.198.25 was paid for 1972-73 and 1973-74 under receipt No.C.D.39700 dated 25-3-1976. Under Exhibit B-14 Municipal tax of Rs.99/- was paid for 1974-75 under receipt No,C.D.80248 dated 29-11-1976. Exhibit B-11 evidences the filing of the suit S.C.No.221 of 1975 on the file of the District Munsif's Court, Trichy to get back a sum of Rs.230/- being the tax paid by the petitioner herein. Under Exhibit B-12, Money order was sent by the tenant as advance rent on 31-5-1977 of a sum of Rs.58/- and received by the respondent herein.

7. The facts narrated above clearly establish the vindictive attitude adopted by the landlord towards the tenant as and from 1970 onwards. All his attempts to hoodwink the petitioner

by setting up his brother-in-law Panchanatham as a tenant under him while the petitioner was away at Ceylon on a pilgrimage, proved futile. Ultimately the petitioner was declared as the direct tenant under the respondent herein in O.S.No.1985 of 1973 and that was confirmed by the Sub-Court, Tiruchirapalli in A.S.No.294 of 1976 as early as on 27-12-1976. The respondent has prayed in his Rent Control application No.115 of 1971 to get the petitioner herein evicted and that petition was dismissed as early as on 16-8-1973. Even prior to that, the anxiety of the petitioner to send the rent by money order is evidenced by Exhibits B-1 to B-5. Subsequently Exhibit B-27, series, which are money order coupons, evidence the anxiety of the petitioner to send the rents to the landlord. In spite of these circumstances, the landlord was bent upon filing suit after suit and also Rent Control Applications in order to evict the petitioner somehow or other. The respondent clutched at every opportunity in order to damage the petitioner and ultimately came with the present R.C.O.P.No.307 of 1977 after having failed in his previous attempts in various proceedings alleging default from 1970 to 1977. The courts below no doubt found that the deposit in the savings bank account and the deposit in the court is not regular, but they were once in two months or three months. Exhibit A-10 is the ledger pertaining to deposit of rents maintained in the Court in R.C.O.P.No.106 of 1971. The counter statement filed by the petitioner amply establishes the particulars of payment and adjustments. The document Exhibit B-22 clearly refers to the payment of property tax by the petitioner and the adjustment of the same towards the rent, and it is clear that the respondent who was the appellant in the proceedings is aware of such payment of property tax and the adjustment of the same towards the rent. It is surprising as to how the respondent ignores all these facts and comes forward with the present eviction petition as if some default has happened in the payment of rent.

8. The attempts made by the petitioner for paying the rent and also protecting his interest are evidenced by the various documents referred to above and they clearly establish that the petitioner was anxious to pay the rents and he has taken all necessary steps to protect his interest and that of the landlord who is the respondent herein. On the other hand, it is patent that the respondent is trying his best to find out some means by which he could victimise the petitioner herein on one ground or other so that he can evict him from the shop under his occupation.

9. In *G.Rangaraju v. Parthasarathy*, (1964)1 M.L.J.12. Venkatadri, J. has observed that a mere default in payment of rent for a few days will not amount to wilful default and to hold that a tenant is wilful in payment of arrears of rent, it must be proved beyond doubt that he had exhibited supine indifference and callousness. On the facts of the present case, it cannot be said that the petitioner herein had exhibited supine indifference and callousness in the payment of rent to the landlord.

10. In *Khivraj v. Maniklal*, I.L.R. (1966)1 Mad.431= A.I.R.1966 Mad.67 Ramamurthi, J. after observing an earlier decision of Rajagopala Aiyangar, J. held that wilful default was a state of mind or intention which must be inferred from the totality of circumstances and that mere default by itself would not amount to wilful default. In this connection, the learned Judge has observed as follows:-

"Keeping in mind the main object of the enactment, namely, prevention of unreasonable eviction of tenants, the principle that emerges from the several decisions is that for default to be regarded as wilful default, the conduct of the tenant should be such as to lead to the inference that his omission was a conscious violation of his obligation to pay the rent or reckless indifference. If the default was due to accident or inadvertance or erroneous or false sense of security based upon the conduct of the landlord himself, the default cannot be said to be wilful

default. It is not possible to lay down any hard and fast rule applicable to all cases. But the basic and essential distinction between mere default and wilful default should be borne in mind and the totality and cumulative effect to all the circumstances should be taken into account and not any particular feature of the case in isolation. In certain cases, the prior conduct of the tenant consisting of chronic defaults taken along with a totally false and reckless plea of discharge or any other wholly untenable plea may amount to wilful default. But at the same time, certain pleas raised by the tenant, but negatived by the court on assessment of the evidence adduced by the landlord and the tenant may constitute proof of *bona fides* on the part of the tenant as to rule out any theory of wilful default."

11. In the same line of thinking is the judgment of Ramaprasada Rao, C.J. in *Rasappa v. Jumnadoss*, (1979)1 M.L.J. 317 wherein the learned Chief Justice has held that the default as a ground for eviction should be such that it should be so conspicuous to a reasonable person that the tenant's attitude was nothing but supine indifference and purposeful evasiveness resulting in his recalcitrance.

12. Thus, it is clear that the facts and circumstances of each case have to be taken note of before coming to the conclusion that the tenant has committed wilful default in the payment of rent. In this background, when we see the decision rendered by Ratnam, J.in *Jagannatha Chettiar v. Swarnambal*, (1984)2 M.L.J.6= 97 L.W.182. I do not think that there is any conflict between the principles enunciated in the other decisions cited by me supra and the principles laid down by Ratnam, J. in the above said decision. In this decision, the learned Judge proceeded on the basis that the tenant without any reference to the landlord has paid and adjusted the property tax towards the payment of tent. As I have observed already, the decision in C.M.A.Nos.248 and 249 of 1973 amply establishes that the landlord is aware of the adjustment of the property tax paid by the tenant towards the rent payable by him. Thus, on facts, the decision of Ratnam, J. in *Jagannatha Chettiar v. Swarnambal*, (1984)2 M.L.J.6= 97 L.W.182 can be distinguished. It is clear from the facts of this case that tenant has taken all possible steps to pay the rents, and even if it is construed that there is wrong adjustment of the property tax towards the payment of rent and that the deposits into court and in savings bank were once in two or three months on certain occasions, that may be a default, but cannot at any stretch of imagination be a wilful default on the facts and circumstances of this case. The systematic harassment by the landlord of the tenant in suits and eviction petitions as noticed above clearly establishes the oblique motive of the landlord to get the tenant evicted somehow or the other. Both the courts below have completely failed to appreciate the above said documents referred to by me while deciding as to whether the tenant has committed wilful default in the payment of rent or not. Every default is not a wilful default. As observed in the above said decisions cited by me, each cash depends upon the facts and circumstances of the particular case. The Courts below failed to refer to the relevant documents stated by me supra and thus erred in coming to the conclusion that the petitioner has committed wilful default in the payment of rent. For the foregoing reasons I hold that there is no wilful default in payment of rents and hence the civil revision petition is allowed and the orders of eviction passed by the authorities below are set aside. There will be no order as to costs.

R.S. ----- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *G.Ramanujam and K.Shanmukham, JJ.*

*W.P.No.156 of 1978. *26th September, 1984.*

P.Sabesan *Appellant**

v.

The State of Tamil Nadu, represented by the Secretary to Government, Home Department, Madras-9 and another *Respondents.*

Police Subordinate Service (Discipline and Appeal) Rules, Rule 15-A - Power of review by whom exercisable - Appellate Authority against the order passed by DIG (Food Cell), whether can exercise the power of review.

The appellant entered service as Sub-Inspector of Police on 1-12-1972 and was later promoted as Deputy Inspector of Police on 3.2.1974. On 14.3.97 a charge memo was issued to him relating to certain delinquencies between 16.9.71 and 6.2.1972, while the appellant was a Sub-Inspector of Police at Manapparai. After receipt of a written explanation, the first oral enquiry was started on 30-9-1974 by the Deputy Superintendent of Police. A supplementary charge memo was issued on 6-6-1974. While the enquiry was proceeding, the appellant was promoted as Inspector of Police on 5.8.1974. The oral enquiry started earlier was continued till September, 1975. Minutes were drawn up by one 'B' Deputy Superintendent of Police who did not conduct the oral enquiry at any stage. Based on the said minutes, the appellant was issued a show cause notice by the D.I.G. Tirunelveli. The appellant made representation to the effect that the D.S.P.who held the enquiry did not draw up the minutes and therefore the entire proceedings stood vitiated. The objection was upheld and the Inspector General of Police ordered one 'T' to draw up a fresh minutes and complete the enquiry. In pursuance of the said direction, 'T' drew up a fresh minutes on 28.3.1977. It was a reproduction of the earlier one drawn up by 'A'. Based on the said minutes dated 28.3.1977, a show cause notice was issued and the appellant made his representation on 18.4.1977. Thereafter the D.I.G. (Food Cell) who is the disciplinary authority passed final orders on 19.5.1977 exonerating the appellant of the charges framed against him. Thereafter a show cause notice was issued on 25.9.1977 under rule 15-A of Police Subordinate Service (Discipline and Appeals) Rules to show cause why he should not be dismissed from service. A writ petition was filed by the appellant seeking a writ of prohibition and the same was dismissed. On appeal,

Held:- The power of review under the above Rule can be exercised by 4 authorities; (1) The State Government, (2) the Head of the Department; (3) the Appellate Authority; and (4) any other authority specified in this behalf by the State Government by a general order or a special order. But the power of review given by the Head of the department is, however, subject to a restriction under the proviso to the Rule. The proviso says that no power of review shall be exercised by the Head of the Department unless the appellate authority, which had passed the appellate order of the authority to which an appeal would be preferred againt the original order is subordinate to him. The second respondent herein was the Head of the Department and he also happened to be the appellate authority. *[Para.4]*

The proviso is specific that if the authority to which an appeal would lie is not sub-ordinate to the Head of the Department, then the latter cannot exercise the power of review. Admittedly any order passed by the D.I.G. (Food Cell) is appealable to the second respondent, who happened to be the Head of Department. The appellate authority was not subordinate to the Head of the Department since both the powers that is the power of Head of the Department and the appellate authority had vested in the same person. In such a case,

the proviso prohibits the head of the Department from exercising the power of *suo motu* review. The proviso to rule 15-A stands in the way of the second respondent exercising his *suo motu* review power under that rule as he happened to be the appellate authority, in the case in which he proposes to exercise the power of *suo motu* review. The show cause notice issued by the second respondent purporting to exercise the power of review under rule 15-A of the Rules should be taken to be without jurisdiction. *[Para.5]*

V.P.Raman, for Appellant.

Chinnaswami, *Add.G.P.*, for Respondents.

The Judgment of the Court was delivered by

Ramanujam, J.:- The appellant herein entered service as Sub-Inspector of Police on 1-12-1962. He was later promoted as Deputy Inspector of Police on 3.2.1974. On 14.3.74 a charge memo was issued to him relating to certain delinquencies between 16-9-1971 and 6-2-1972, while the appellant was Sub-Inspector of Police at Manapparai. After receipt of a written explanation, the first oral enquiry was started on 30-4-1974 by one L.R.Nagaswami, Deputy Superintendent of Police. A supplemental charge memo was issued on 6.6.1974. While the enquiry was proceeding, the appellant was promoted as Inspector of Police on 5.8.1974. The oral enquiry, which was originally undertaken by L.R.Nagaswamy, was continued by one Thirumalai Nambi Deputy Superintendent of Police, Manapparai and that was continued till September 1975, when the enquiry was concluded. The minutes were drawn up by one L.R.Natarajan, Deputy Superintendent of Police, Manapparai, who did not conduct an oral enquiry at any stage. Based on the said minutes, the appellant was issued a show cause notice by the D.I.G.Tirunelveli on 12th July, 1976. The appellant made his representations to the effect that the D.S.P., who held the enquiry, did not draw up the minutes and therefore the entire disciplinary proceedings stood vitiated. This objection was upheld and the Inspector General of Police ordered Tirumalai Nambi to draw up a fresh minutes, who completed the enquiry. In pursuance of the said direction, Tirumalai Nambi drew up a fresh minutes on 28.3.1977. It was an exact reproduction of the earlier one drawn by L.R.Natarajan. Based on the said minutes dated 28.3.1977, a show cause notice was issued and the appellant made his representations on 18-4-1977. Thereafter D.I.G. (Food Cell), who is the disciplinary authority, passed final orders on 19-5-1977 enonerating the appellant of the charges framed against him. Thereafter on 25-9-1977 a show cause notice under rule 15-A of the Police Subordinate Service (Discipline and Appeals) Rules, was issued by the second respondent herein to show cause why he should not be dismissed from service. The appellant sought a copy of the rules and the detailed order passed by the D.I.G. exonerating him from the charges levelled against him. The appellant was supplied with the copy of the rules as well as the order of D.I.G. on 7.12.1977. At this stage, the appellant filed a Writ Petition No.236 of 1978 seeking a writ of prohibition restraining the second respondent from passing an order under rule 15-A referred to above. The said writ petition came to be dismissed by Mohan, J. and the present writ appeal is filed questioning the correctness of the order of Mohan, J.

2. In this writ appeal, Mr.V.P.Raman, the learned counsel for the appellant has raised very many contentions. But we feel it unnecessary to deal with all the contentions raised by him.

3. The learned counsel for the appellant argued in detail that the second respondent being an appellate authority, against the order passed by D.I.G. (Food Cell), who has chosen to exonerate the appellant from all charges, cannot exercise the power of review and impose the punishment of dismissal from service as proposed by him. According to the learned Counsel, the power of review can be exercised only if the appellate

authority is subordinate to the Head of the Department. It is not disputed that in this case the second respondent, Inspector General of Police, is the appellate authority over the orders passed by the D.I.G. (Food Cell), who has passed the final order exonerating the appellant from all the charges levelled against him. The question is whether in these circumstances, the second respondent can invoke the power under rule 15-A of the Police Subordinate Service (Discipline and Appeal) Rules. Rule 15-A, which was in force at the relevant time is as follows:

"15-A(1) Notwithstanding anything contained in these rules:
(i) the State Government or
(ii) the Head of the Department directly under the State Government in case of a Government servant serving in a department or office, under the control of such Head of the Department or;
(iii) the appellate authority, within six months from the date of the order proposed to be reviewed: or
(iv) any other authority, specified in this behalf of the State Government by a General or Special order, and within such time as may be prescribed in such general or special order may, at any time; either on their or its own motion or otherwise, call for the records and inquire and review any order made under these rules, after consultation with the Tamil Nadu Public Service Commission, where such consultation is necessary and may,
(a) confirm, modify or set aside the order, or
(b) confirm, reduce, enhance or set aside the penalty imposed by the order, or impose any penalty, where no penalty has been imposed; or
(c) remit the case to the authority, which made the order or to any other authority, directing such authority to make such further inquiry, as it may consider proper in the circumstances of the case; provided that no order imposing or enhancing any penalty shall be made by any reviewing authority unless the Government servant concerned has been given a reasonable opportunity of making representation against the penalty proposed, where it is proposed to impose any of the penalties specified in Clauses *(d)*, *(e)*, *(f)*, *(i)* and *(j)* of rule 2 or to enhance the penalty imposed by the order sought to be reviewed to any of the penalties specified in those clauses, no such penalty shall be imposed except after an inquiry in the manner laid down in sub-rule.
(b) of rule 3 and after giving a reasonable opportunity to the Government servant concerned of showing cause against the penalty proposed on the evidence adduced during the inquiry and except after consultation with the Tamil Nadu Public Service Commission, where such a consultation is necessary:
Provided further that no power of review shall be exercised by the Head of the Department, unless;
(i) the authority which made the order (in appeal) or *(ii)* the authority to whcih an appeal would lie where no appeal has been preferred, is subordinate to him;
(2) No proceeding for review shall be commenced until after,
(i) the expiry of the period of limitation for an appeal or
(ii) the disposal of the appeal, where any such appeal has been preferred.
(3) an application for review shall be dealt with in the
(4) same manner as if it were an appeal under these rules."

The power of review under the above rule can be exercised by 4 authorities; (1) The State Government, (2) the Head of the Department; (3) the Appellate authority; and (4) any other authority specified in this behalf by the State Government by a general order or a special order. But the power of review given to the Head of the department is, however, subject to a restriction under the proviso to the rule. The proviso says that no power of review shall be exercised by the Head of the department unless the appellate authority, which had passed the appellate order or the authority to which an appeal would be preferred against the

original order is subordinate to him. The second respondent herein is the Head of the Department and he has also happened to be the appellate authority. As the appellate authority in this case is not subordinate to the Head of the Department, the former cannot exercise the power of review under the said proviso.

5. According to the learned Government Pleader, the said proviso can apply only when the Head of the department and the appellate authority are different. But we do not see any reason to limit the operation of the proviso as suggested by the learned Government Pleader. The proviso is specific and it says that if the authority to which an appeal would lie is not subordinate to the Head of Department, then the latter cannot exercise the power of review. Admittedly any order passed by the D.I.G. (Food Cell) is appealable to the second respondent, who happens to be the Head of the department. Thus the appellate authority is not sub-ordinate to the Head of the department, both the powers that is the power of Head of the Department and the appellate authority having vested in the same person. In such a case, the proviso prohibits the head of the department from exercising the power of *suo motu* review. Thus the proviso to rule 15-A stands in the way of the second respondent exercising his *suo motu* review power under that rule as he happens to be the appellate authority, in the case in which he proposes to exercise the power of *suo moto* review. Thus the show-cause notice issued by the second respondent proposing to exercise the power of review under rule 15-A of the rules should be taken to be without jurisdiction. It is significant to note that the learned Judge while passing the order under appeal has not considered the scope and ambit of rule 15-A under which the second respondent proposed to exercise his power of review. It appears that this point was not urged before the learned Judge and the same was urged for the first time before us. However having regard to the fact that the point urged is a purely legal point arising out of an interpretation of a statutory provision. we heard both the learned counsel for the appellant and the learned Government Pleader for the respondents on this point.

6. In the result the order of the learned single Judge is set aside and the appeal is allowed. Writ of Prohibition will issue. There will no order as to costs.

7. We make it clear that in view of our above decision, we are not expressing our opinion on the other points raised in the writ appeal.

R.S. ---- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *G.Maheswaran, J.*

*S.A.No.1312 of 1981. 19*th September*, 1984.

Jayalakshmi and others *Appellants**

v.

Kaliaperumal *Respondent.*

Transfer of Property Act (IV of 1882), Section 126 - Deed of gift if void and when can be revoked.

Except in the circumstances mentioned in section 126 of the Transfer of Property Act, a gift cannot be revoked. A gift may be revoked as if it were a contract, but not on the ground of want of consideration or failure of consideration. A gift may be revoked for coercion, fraud or misrepresentation or undue influence in the same way as a contract may be rescinded.

The four essential conditions for revocation under section 126 are:

1. that the donor and the donees must have agreed that the gift shall be suspended or revoked on the happening of a specified event;
2. such event must be one which does not depend upon the donor's will;
3. the donor and the donee must have agreed to the condition at the time of accepting the gift;
4. the condition should not be illegal or immoral and should not be repugnant to the estate created under the gift.

In the instant case such circumstances not having been made out the gift cannot be revoked. *[Para.6]*

Case referred to:-

Villers v. Beaumont, (1682)1 Vern.101.

R.Shanmugham, for Appellants.

G.Masilamani, for Respondent.

The Court delivered the following

JUDGMENT:- The defendants are the appellants. One Arumugha Asari, owner of the suit property, donated it to Kamalakshi Ammal, his sister-in-law who is also the mother-in-law of the plaintiff under Exhibit A-1 on 22-4-1970. He revoked that deed under Exhibit B-1 on 24-8-1973. On the same day he executed another deed of donation under Exhibit A-3, in favour of defendants. The defendants have taken possession of the suit property. The plaintiff, in whose favour Kamalakshi Ammal has executed the gift deed, has filed the suit on the ground that the deed of donation dated 24-8-1973 under Exhibit A-3 is null and void and that it was obtained by coercion and for recovery of possession of that portion of the property occupied by the defendant.

2. The first defendant in her answer stated that Exhibit A-3 was not obtained by coercion or under undue influence, but was executed voluntarily by the donor, that Arumugham Asari donated the property in favour of Kamalakshi in the hope that she will maintain him, but as she has failed to maintain him he has cancelled the deed.

3. The trial court found that Exhibit A-3 was not executed under coercion, but however decreed the suit of the plaintiff on the ground that Arumugham Asari cannot revoke the gift deed in favour of Kamalakshi. The appellate court confirmed that decree and dismissed the appeal.

4. A learned Judge of this court while admitting the second appeal has formulated the following substantial questions of law:

1. Whether the revocation of the gift is valid?
2. Whether the deed of donation dated 24-8-1973 was obtained by coercion and fraud and therefore invalid?

5. The second point of law framed by the learned judge need not detain us any longer in view of the finding of the trial court that Exhibit A-3 was not obtained by coercion. The appellate Judge does not deal with this point. But, however, there is absolutely no evidence to show that Exhibit A-3 was executed under coercion or undue influence. In fact P.W.1 does not anywhere say that Exhibit A-3 was obtained by coercion or by fraud or by undue influence. In the circumstances, the trial court was correct in coming to the conclusion that Exhibit A-3 was not obtained by undue influence, coercion or fraud. That disposes of the second question of law.

6. The deed of gift was cancelled under Exhibit B-1. Section 126 of the Transfer of Property Act deals with the question of revocation or suspension of the gift. It reads that the donor and the donee may agree that on the happening of any specified event which does not depend on the will of the donor, a gift shall be suspended or revoked. The latter part of section 126 says that a gift which the parties agree shall be revocable wholly or in part at the mere will

of the donor is void wholly or in part, as the case may be. The second part of section 126 says that a gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded. Then follows the more important clause", save as aforesaid, a gift cannot be revoked". That will show that except in the circumstances mentioned in section 126 of the Transfer of Property Act, a gift cannot be revoked. A gift may be revoked as if it were a contract, but not on the ground of want of consideration or failure of consideration. A gift may be revoked for coercion, fraud or misrepresentation or undue influence in the same way as a contract may be rescinded. It has already been pointed out that Exhibit A-3 was not obtained under coercion. The four essential conditions for revocation under section 126 are:-

1. that the donor and the donee must have agreed that the gift shall be suspended or revoked on the happening of a specified event;
2. such event must be one which does not depend upon the donor's will;
3. The donor and the donee must have agreed to the condition at the time of accepting the gift;
4. The condition should not be illegal or immoral and should not be repugnant to the estate created under the gift.

In the present case, in Exhibit A-1 no condition is stipulted. The cancellation deed, Exhibit B-1, mentions that the donor had the fond hope that Kamalakshi Ammal will maintain him, but he was disillusioned with that hope and that he is therefore revoking the deed. Exhibit A-1 does not contain any condition that Kamalakshi should maintain the donor. It is therefore clear that the donor has revoked the gift under Exhibit A-1 at his pleasure. As already pointed out, a gift may be revocable by being subject to a condition subsequent, but the condition cannot depend upon the will of the donor, for a gift revocable at pleasure is no gift at all. In this connection, the observations of Lord Nottingham in the case of *Villers v. Beaumont*, (1682)1 Vern.101 which are apt may be extracted:

"If a man will improvidently bind himself up by a voluntary deed and not reserve a liberty to himself by a power of revocation, this court will not loose the fetters he hath put upon himself, but he must lie down under his own folly, for if you would relieve in such a case, you must consequently establish this proportion, namely, that a man can make no voluntary disposition of his estate but by his will only, which would be absurd."

It is therefore clear that except in the circumstances mentioned in section 126 of the Transfer of Property Act, a gift cannot be revoked. Such circumstances having not been made out, the gift under Exhibit A-1 cannot be revoked. The result is the second appeal fails and is dismissed, but without costs.

R.S. ------ *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *P.R.Gokulakrishnan, J.*

*C.R.P.Nos.3769, 3770/82 and 210/83.
19th September, 1984.

Sherwood Educational Society, Madras-31
*Petitioner**

v.

Hussainy Begum Namazie and others
Respondents.

Tamil Nadu Buildings (Lease and Rent Control) Act (18 of 1960), section 4(3) - Fair rent fixation - Methods to be followed - Sheds put up by tenant cannot be added to the cost of construction incurred by landlord - Depreciation of one and a half per cent allowable to type 2 buildings - Fixation of ground value.

In this case the lower appellate authority has included the shed put up by the tenants is an area of 2061 sq.ft. and added it to the cost of construction incurred by the landlords. This method of calculation cannot be sustained. The construction put up by the tenant has to be omitted from the cost of construction. *[Para.3]*

As regards depreciation, the second type of buildings, for which one-and-a-half per cent depreciation is allowable are buildings built partly of brick in lime mortar and partly of brick and in which teak has been used. The instant building can be safely brought under type 2 building and the Rent Controller has correctly given one-and-a-half per cent depreciation. *[Para.4]*

As regards the ground value to be fixed as per section 4(4) of the Act 18 of 1960 the total area demised for occupation of the tenants is 26464 sq.ft. of which the constructed portion by the landlord is 3854 sq.ft. The tenant has constructed in about 2061 sq.ft. Hence open ground left after such construction is eight grounds and 1399 sq.ft. It is not possible to take all the 8 grounds and 1399 sq.ft. as an amenity for play ground as per the first schedule to section 4. In the 8 grounds and odd, 4 grounds and 1399 sq.ft. can be safely regarded as play ground that comes under the amenities mentioned in schedule I to section 4. The other 4 grounds along with 2061 sq.ft. on which the tenant has put up construction will have to be taken as appurtenant land to the main building. *[Para.6]*

Case referred to:-

C.S.Rajavelan v. A.N.Parasurama Iyer, (1970)83 L.W.524.

Petitions under section 4(3) of Tamil Nadu Act 18/60 as amended by Act 23/78 praying the High Court to revise the order of the court of the Small Causes (IV Judge, Appellate Authority) Madras dated 25-2-1982 and made in H.R.A.Nos. 320/80 and 402 of 1980 respectively H.R.C.No.1855 of 79 VIII Judge (Rent Controller) Court of Small Causes, Madras.

The Court delivered the following

JUDGMENT:- Both the tenant and the landlords have filed the Civil Revision Petitions herein. H.R.C.No.1855 of 1979 was filed by the landlords for fixing fair rent. The premises in question are New Door No.9, Old No.50, Harrington Road, Chetput, Madras. The contractual rent is Rs.2,400/-. The tenant is running a school by name Sherwood Education Society. Mr.Viswanathan, learned counsel appearing for the tenant states that more than two thousand pupils are studying in this school. The Rent Controller fixed the fair rent at Rs.4,200/- per month. The landlords preferred H.R.A. No.402 of 1980 for enhancing the fair rent. The tenant preferred H.R.A.No.320 of 1980 for reducing the rent fixed by the Rent Controller. The lower appellate Authority enhanced the fair rent to Rs.6,185/- on the appeal H.R.A.No.402 of 1980. The appeal filed by the tenant, *i.e.* H.R.A.No.320 of 1980 was dismissed.

The tenant has preferred C.R.P.No.3769 of 1982 against H.R.A.No.402 of 1980 and C.R.P.No.3770 of 1982 against H.R.A.No.320 of 1980. The landlords have preferred C.R.P.No.20 of 1983 for enhancing the fair rent fixed by the lower appellate Authority.

2. Mr.Viswanathan, learned counsel appearing for the tenant, took me through the pleadings, evidence and the orders of the Authorities below and contended that both the Rent Controller and the lower appellate Authority are not correct in enhancing the contractual rent fixed per month. Mr.Mateen Ghatala, the learned counsel appearing for the landlords, contended that the rate of construction as per P.W.7 should have been taken and should be on the present market rate; that the open space should be taken into consideration and that will include the playground also for calculating the cost of the demised portion; and that the rent fixed by the lower appellate Authority has to be enhanced.

3. During the arguments, the respective counsel had to accept that the cost of construction stated by the tenant is correct. One of the landlords who was examined as P.W.1 has, in his examination-in-chief itself, accepted that the cost of construction stated by the respondent is correct. To substantiate this aspect of the case there is the evidence of R.W.1 the engineer examined on the side of the tenant. Further, both the Counsel accept the measurements given for various constructions and the extent of the land on the demised portion and also accept that the age of the building is forty years. The lower appellate authority has included the sheds put up by the tenant in an area of 2061 sq.ft. and added it to the cost of construction incurred by the landlords. This method of calculation cannot be sustained in view of the decision rendered in *C.S.RAJAVELAN AND OTHERS v. A.N.PARASURAMA IYER*, (1970)83 L.W.524, Mr. Justice Ramaprasada Rao (as he then was) interpreting the word 'building' and the word 'constructed' observed as follows:

"The word 'building' and the word 'constructed' obviously refer to the building constructed by the landlord and not the superstructures to be constructed by the tenant after letting. I am unable to agree with the contention of learned counsel for the petitioners that the land on which the tenant has raised superstructures for his convenient enjoyment or otherwise ought also to be reckoned and evaluated for purpose of fixing the total cost referred to in section 4(3)(a) of the Act."

Hence the construction put up by the tenants have to be omitted from the cost of construction.

4. As regards the depreciation, the Rent Controller allowed one-and-a-half per cent depreciation. It is an admitted position that the building is not having teak would throughout. Depreciation as per the rates of the depreciation mentioned in Schedule 2 cannot be one per cent since one per cent depreciation calculation will enure to the buildings built in lime mortar and in which teak has been used throughout. The second type of buildings for which one-and-a-half per cent depreciation is allowable are buildings built partly of brick in lime mortar and partly of brick in mud and in which to teak has been used. The building can be safely brought under type 2 building and the Rent Controller has correctly given one-and-a-half per cent depreciation. Further, the second petitioner, who is one of the landlords and who examined himself as P.W.1, has accepted that the cost of construction is correct. If that be so, the category will fall under type 2 buildings in the second schedule.

5. As regards the cost of the land both the Rent Controller and the appellate Authority have fixed the rate at Rs.50,000/- per ground. This is based upon the value fixed by the Urban Land Tax Authority in 1971 after adding twelve-and-a-half per cent per year as is used to be done by the Urban Land Tax Authority for evaluating the land value. Both the counsel have nothing

to say with regard to the said procedure adopted by the authorities below in fixing the land value. Hence, I agree with the reasoning of the authorities below in fixing the land value at Rs.50,000/- per ground.

6. As regards the ground value to be fixed as per section 4(4) of the Act, the total area demised for occupation of the tenants is 26464 sq.ft. of which the constructed portion by the landlords in 3854 sq.ft. The tenant has constructed in about 2061 sq.ft. Hence the open ground left after such constructions is eight grounds and 1399 sq.ft. It is not possible to take all this 8 grounds and 1399 sq.ft. as an amenity for play ground as per the first schedule to section 4. In the 8 grounds. and odd, 4 grounds and 1399 sq.ft. can be safely regarded as playground that comes under the amenities mentioned in schedule I to section 4. The other 4 grounds along with 2061 sq.ft. on which the tenant has put up construction will have to be taken as appurtenant land to the main building. By properly calculating the cost of the building in the light of the above said facts, it comes to Rs.2,53,401/-. Deducting the one-and-a-half per cent depreciation the value comes to Rs.1,37,976/-. The amenities at the rate of ten per cent come to Rs.13,797. Adding this, the cost of the building will increase to Rs.1,51,773. The cost of the land, *i.e.* the land on whcih the superstructure stands, plus half of the appurtenant land (appurtenant land is 4 grounds and 2061 sq.ft.), comes to Rs. 1,89,675/-. The total, after adding this, for the purpose of calculating the construction cost comes to Rs. 3,41,448/-. To this, I am of the view, 25% amenities can be safely added in order to determine the actual cost of construction for the purpose of the Act. That comes to Rs.85,362/-. Adding this amenity, the total cost of construction for the purpose of a ascertaining the fair rent, comes to Rs.4,26,810/-. The twelve per cent per annum on the cost of construction accepted by the two authorities below can be safely adopted since I am in complete agreement with the reasoning and findings of the authorities below on this aspect of the case. On this calculation, the fair rent payable will come to Rs.4,268/- per month. This, in my opinion, is the fair rent for the premises in question and the said fair rent is payable from the date of the Rent Controller Application, which is 10-6-1979.

7. With this modification in the fair rent fixed by the authorities below, C.R.P.No.3770 of 1982 is dismissed. C.R.P.No.3769 of 1982 is partially allowed and in other respects, it is dismissed. C.R.P.No.210 of 1983 is dismissed. There will be no order as to costs in these civil revision petitions.

8. Mr.Viswanathan, learned counsel appearing for the tenant, submits that time may be granted for the tenant to pay the fair rent fixed as on date, since his client will have to pay the fair rent as and from 10-6-1979 onwards. The tenant is granted six months time for paying fair rent at the present rate as and from 10-6-1979 till the end of August 1984. The rent for September 1984 as per fair rent fixed now will be paid within October, 1984.

R.S. ---- *Order modified.*
CRP 3769/82 partly allowed.
CRP 210/83 dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

Present:- *S.Natarajan and K.Venkataswami, JJ.*

*W.P.No.10714 of 1983. *4th April*, 1984.

P.K.Subramani *Petitioner**

v.

Paster Mani, Madras-11 and another *Respondents.*

Constitution of India (1950), Article 226 - Writ of Hebeas Corpus - Adoption of minor child by Belgian couple - Petition filed on the original side of the High Court - Necessary formalities observed - Child entrusted to the Belgian Couple - After four years father of the child questioning the entrustment through a writ of Habeas Corpus - Proper remedy is to file petition for cancellation of the order.

On the question whether a writ of *habeas corpus* can be issued in regard to a child in lawful custody with its adoptive parents in Belgium as per the order of the High Court in O.P.No.500 of 1978 on a technical plea that he was not a party to the proceeding,

Held:- If the petitioner is aggrieved with the appointment of the first respondent as guardian and the permission granted to him by Court to hand over the custody of the child to the foreign parents, then the proper course for him is to approach the learned Judge sitting on the original side of the High Court and seek revocation of the order passed in O.P.No.500 of 1978. Probably, the petitioner does not want to resort to such a course because he will have to substantiate his contentions by evidences and he may also find it difficult to get over the documents executed by him and the letters written by him. Whatever may be the reason for the petitioner's reluctance to approach the original side of the High Court, it has to be pointed out that as per law, the only remedy available to the petitioner is to seek cancellation of the order in O.P.No.500 of 1978 and then seek enforcement of his rights as the father of the minor child to get back its custody. Without doing any of the things open to him under the law, the petitioner cannot rush to the writ court alleging unlawful detention of the child on the basis of conjeatures and imaginary contentions. No writ can be issued in case of this type. *[Para.3]*

Cases referred to:-

Gohar Begum v. Suggi, 1960 S.C.J.31= (1960) M.L.J. (Crl.)1= (1960)1 S.C.R. 597= A.I.R.1960 S.C.93; *Dr.Mrs.Veenakapoer v. Varinder Kumar*, (1982)1 S.C.J. 202= (1982) M.L.J. (Crl.) 336= (1981)3 S.C.C.92= (1980) S.C.C. (Crl.) 650= (1980) Crl.L.J.580= A.I.R.1982 S.C.792; *Marggarate Marie Pulparampil Nee Feldman v. Dr. Chacko*, A.I.R.1970 Ker.1.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a Writ of *Habeas Corpus* directing the first respondent to produce the petitioner's son Ambashankar alias Jayapaul before this Honourable Court and set him at liberty.

P.Santhara Subbu, for Petitioner.

K.Ramaswamy and Miss.Padmini Jesudorai, for Respondents.

The Order of the Court was made by

Natarajan, J.:- This writ petition for the issue of a writ of *habeas corpus* for causing the production of a minor boy by name Ambasankar alias Jayapaul has come to be filed on account of a gross and total misconception of the circumstacnes under which a petition of this nature can be filed. The facts of the case are briefly as under:
The petitioner is the father of a minor by name Jayapaul. He had entrusted

the custody of the child as early as in the year 1978 to the first respondent herein who is running an institution known as "Prayer House". It is said to be an association registered under the Societies Registration Act and to be engaged in running an orphanage as well as maintaining a home for aged persons and for destitute widows. According to the first respondent, the petitioner informed him that after the death of his wife, he had married again and his second wife was averse to bringing up the minor child born to his first wife and therefore, the child may be taken care of in the orphanage run by the first respondent. Some months thereafter a Belgian couple expressed their desire to adopt an Indian child. The first respondent would say that the petitioner was contacted and he gave his consent to the child being taken in adoption by the Belgium couple; but the petitioner would deny it. Be that as it may, the first respondent filed a petition O.P.No.500 of 1978 on the Original Side of the Court under sections 3,7 to 10 of the Guardians and Wards Act. After the formalities regarding publication of notice etc., were observed, a learned Judge of this Court passed an order on 10-12-1978 declaring the first respondent to be the lawfully appointed guardian of the minor child Jayapaul and permiting the first respondent to entrust the custody of the minor child to the foreign couple Mr.Raucy Clande Boger and Mrs.Raucy Alberte Champencis residing at 18, Avenue Dela Victoire Virton, Belgium, through their power of attorney agent Miss Alma Philips, English Professor, Cultural Academy, 19, Santhome High Road, Mylapore, Madras, for being taken to Belgium for the purpose of being fostered, maintained and brought up by the said Mr.Raucy Claude Roger and Mrs.Raucy Alberte Champenois. The Court imposed a condition that Mr.Raucy Claude Roger and Mrs. Raucy Alberte Champenois should send to this Court an appeal report along with recently taken photographs of the minor child in order to satisfy the Court that the child was being looked after well. The first of such reports was directed to be filed on or before 31.12.1979. According to the first respondent, the petitioner was fully aware of all these things and he gave his whole-hearted consent and he also executed an agreement on stamp paper on 8-1-1979 agreeing to the child being taken by the Belgian couple as their adopted son and giving an undertaking that neither he nor his relations or friends would go back on the arrangements and give any trouble or cause any less to the first respondent that till recently, the petitioner had been corresponding with the adoptive parents and in one of those letters dated 27-10-1979, the petitioner has categorically stated as follows:

> "We have no objection to I Jayapaul staying with you; Let him be your son itself. But we are eager to have some contact with you merely writings".

It is further written in the letter that the adoptive parents may write to him (the petitioner) in future and not to the first respondent. Lastly, he concludes the letter invoking the blessings of God for the grace shown by them on Jayapaul.

2. In spite of all these, the petitioner has come forward with this petition stating that the entrustment of the custody of the minor child to the first respondent was only a temporary arrangement and the first respondent had no authority to act as the Guardian of the minor child and send him away in adoption to Belgium. According to the petitioner, the agreement on stamp paper is a document in which his signature was obtained without his knowing what the contents were. In so far as the letters are concerned, he has no specific answer except to say that the taking away of the child in adoption was not with his consent. The technical plea raised by him is that he was not made a party to the proceedings in O.P.No.500 of 1978 and therefore, the order passed by the Court is not binding on him. The learned counsel for the petitioner asserts without any materials whatever, that the child is being made to serve

as a domestic servant by the adoptive parents in Belgium and the child is living in inhuman conditions. Therefore, he would say that the child is not leading a dignified way of life and such a mode of life violates Article 23 of the Constitution of India. He would also say that the child has been exported for monetary considerations by the first respondent without the consent of the father who is the natural guardian and that again is illegal. The further submission made is that the father is the natural and lawful guardian and he is entitled to seek the issue of a writ of *habeas corpus* for getting the custody of his child. In support of thse propositions, he cites the decisions in *GOHAR BEGUM v. SUGGI Alias NAZMA BEGAM AND OTHERS*, 1960 S.C.J.31= (1960) M.L.J.(Crl.)1= (1970)1 S.C.R.597= A.I.R.1960 S.C.93 and *DR.MRS.VEENAKAPOOR v. VAHINDER KUMAR KAPOOR*, (1982)1 S.C.J.202= (1982) M.L.J.(Crl.)336= (1981)3 S.C.C.92= (1981) S.C.C.(Crl.) 650= (1982) Crl.L.J.580= A.I.R.1982 S.C.792. Those authorities have no relevancy at all to the facts of the case on hand. When asked as to how a writ of *habeas corpus* can be enforced when the child is beyond the shores of this country and when the persons having the custody of the child are not parties to these proceedings, the counsel would cite the decision in *MARGGARATE MARIA PULPALAMPIL REE FELDMAN v. DR.CHACKO PULARAMAPIL AND OTHERS*, A.I.R.1970 Ker.1 which was rendered under entirely different circumstances.

3. For a variety of reasons, we have no hesitation in holding that this petition is totally misconceived and it has been filed on account of a total lack of understanding of the scope of *habeas corpus* proceedings. In the first place, the child is not in unlawful custody. On the other hand, it is in the custody of the adoptive parents in Belgium in conformity with the order passed by this court in O.P.No.500 of 1978. Therefore, it is totally wrong for the petitioner to say that the child is being kept in unlawful detention. If the petitioner is aggrieved with the appointment of the first respondent as the guardian and the permission granted to him by the Court to hand over the custody of the child to the foreign parents, then the proper course for him is to approach the learned Judge sitting on the original side of the High Court and seek revocation of the orders passed in O.P.No.500 of 1978. Probably, the petitioner does not want to resort to such a course because he will have to substantiate his contentions by evidence and he may also find it difficult to get over the documents executed by him and the letters written by him. Whatever may be the reason for the petitioner's reluctance to approach the Original Side of the High Court, we have to point out that as per law, the only remedy available to the petitioner is to seek cancellation of the orders of this court in O.P.No.500 of 1978 and then sek enforcement of his rights as the father of the minor child to get back its custody. The learned counsel for the petitioner would say that the adoptive parents have not conformed to the conditions of undertaking given by them in O.P.No.500 of 1978. If that he so, that is also a matter which has to be brought to the notice of the concerned court so that the court can take appropriate action against the erring persons for non-observance of the conditions oof the bond. Without doing any of the things open to him under law, the petitioner cannot rush to this court alleging unlawful detention of the child on the basis of conjectures and imaginary contentions. We are therefore clearly of opinion that no writ can be issued in cases of this type. As a result of this finding, the writ petition deserves to fail and accordingly it will stand dismissed. Rule nisi will stand discharged.

4. The learned counsel for the petitioner makes an oral application under Article 134-A read with Articles 133 and 134(1)(c) of the Constitution of India for leave being granted to the petitioner to appeal to the Supreme Court. Since the petitioner has not been shut out of the remedies available

to him under law in spite of the dismissal of this petition and since the matter is not of such importance and gravity as to call for a determination of the question by the Supreme Court, we decline to grant leave.

R.S. --- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *P.R.Gokulakrishnan, J.*

*C.R.P.No.312 of 1984. 10*th August, 1984.*

P.Annamalai *Petitioner**

v.

Periathambi *Respondent.*

Execution - Dispute between parties referred to Arbitrator - Award - Decree passed in terms of the award - Petition by party for taking possession of house property as per the decree - Objection that the decree was only declaratory and was not executable - Objection rejected.

Where the arbitrator's award showed that the petitioner has to get certain premised and a sum of Rs.50,000/- from the respondent and he has to give a release of his share in respect of all the other family properties including the family business and the respondent had accepted the award and sought a decree in terms of it, on the question whether the decree was only declaratory in character and not executable,

Held:- The facts of this case clearly establish that the decree in terms of the award is not a declaratory one, but the petitioner is entitled to get possession by executing the same. At the execution stage, the court is concerned only with the decree as it stands and the respondent cannot go behind the decree and say that it is not executable. It is the respondent who bargained for the said decree for getting possession of the property after the petitioner executing the release deed. It is said that the respondents deposited the sum of Rs.50,000/- int the Court and the petitioner herein has also withdrawn the same. The petitioner is prepared to execute the release deed as per the award and the decree and file it into the executing Court before he gets an order for possession in the E.A.filed before the executing court. The petitioner can execute the decree for taking possession of the shop. *[Para.9]*

Cases referred to:-

Poon Cholai Mudaliar v. Chockalingam Mudaliar, (1974) T.L.N.J.13; *Debabrata v. Biraj Mohan, A.I.R.1983 Cal.51; Ratan Lal v. Prushottam*, (1974)1 S.C.C.671= (1974)3 S.C.R.109= A.I.R.1974 S.C.1066.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Additional Subordinate Judge, Kancheepuram dated 13-12-1983 and made in E.P.No.21/83 in Award O.P.No.23/82.

M.Srinivasan for *S.Krishnaswamy*, for Petitioner.

The Advocate General for *D.Raju and M.Venkatachalapathy*, for Respondents.

The Court made the following

ORDER:- This civil revision petition is filed against the order passed in E.P.No.21 of 1983 in Award No.23 of 1982 on the file of the Additional Subordinate Judge of Kancheepuram. The petitioner in that E.P. has come forward with this petition.

2. The respondent is the father of the petitioner herein. Dispute arose between the petitioner and the respondent which culminated in referring the matter for arbitration as early as on 29.5.1982. In and by the arbitration award, the petitioner herein has to get, apart from door No.69, Pallikudathan Mudali Street, also door No.183-A shop situated at Gandhi Road, Kancheepuram along with a sum of Rs.50,000/- payable by the respondent herein. The respondent herein, as submitted by Mr.R.Krishnamoorthy, learned Advocate General, deposited the sum of Rs.50,000/- into the Court and filed arbitration O.P.No.23 of 1982 on the file of the Sub-Court, Kancheepuram praying to pass a decree on the basis of the award filed along with that petition and to award the cost of the said O.P. In pursuance of this petition filed by the respondent, the Subordinate Judge, Kancheepuram passed a decree on 31.3.1983 stating that the petitioner herein has to get as his share door No.183-A shop Gandhi Road, Kancheepuram and also a sum of Rs.50,000/- deposited into the Court by the respondent herein. The decree further states that the petitioner has to get release from the respondent herein in respect of all other properties including the business share belonging to the respondent herein. The decree further, states, apart from other things, that the arbitration award is also attached to the decree.

3. In pursuance of this decree, the petitioner herein filed the present E.P.to take possession of the house property and also the sum of Rs.50,000/- mentioned in the decree dated 31.3.1983. The respondent herein filed a counter stating that the decree is not executable for possession, that the petitioner in the execution petition cannot evict the respondent herein except under the provisions of Tamil Nadu Act 18 of 1960 and that there is nothing in the decree directing the respondent to hand over possession of the shop to the petitioner herein. The executing court after observing that the decree is only a declaratory decree and as such execution for taking possession on the said decree is not maintainable, dismissed the E.P. The order further states that the petitioner herein has to seek other remedy for getting possession of the property mentioned in the execution petition, and cannot get possession on the strength of the decree passed on 31.3.1983. Aggrieved by the said order, the present civil revision petition has been filed by the petitioner in E.P.No.21 of 1983.

4. Mr.M.Srinivasan, learned counsel for the petitioner, at the beginning itself submitted that his client is prepared to execute a release deed in respect of all the other properties and the business share of the respondent herein and file the same before the executing court before any order is obtained by the petitioner herein on the execution petition to get at the properties mentioned in the execution petition. It is further submitted that the award and the decree both in its wording and intendment clearly establish that the petitioner has to get possession of the house property mentioned and also the sum of Rs.50,000/- deposited into the Court by the respondent herein. Mr.R.Krishnamoorthy, learned Advocate General, appearing for the respondent, submitted that the decree is only a declaratory one, that the arbitration award which is not registered cannot be acted upon and that the petitioner has to seek appropriate remedy to get at the property mentioned in the arbitration award.

5. I have carefully gone through the arbitration award, the decree passed in terms of the award and the other connected records in this case. It is on the initiative of the respondent herein the decree was passed in the O.P. in terms of the award. The parties submitted to the arbitration as early as on 29.5.1982. The arbitration award is clear to the effect that the petitioner has to get apart from house No.60, Pallikudathan Mudali Street, which he got by partition prior to the arbitration, door No.183-A shop at Gandhi Road, Kancheepuram and also the sum of Rs.50,000/-. He must also get

a release from the respondent herein from all other family properties and also from the share of the business belonging to the respondent herein. Though the clauses in the arbitration award are not happily worded with regard to release, a reading of the award will make the intention of the parties clear, merely, that the petitioner has to get door No.183-A shop Gandhi Road, Kancheepuram and a sum of Rs.50,000/- from the respondent herein and that the petitioner must give release in respect of all the other family properties including the share belonging to the respondent herein in the business. In O.P.No.23 of 1982 filed by the respondent herein for getting a decree in terms of the award, the respondent herein has categorically stated that he will act as per the award and is prepared to give the property as well as the cash as directed by the arbitrators and get the release from the petitioner herein. In paragraph 10 of the petition filed by the respondent herein, the respondent has no doubt stated as follows:-

> "The petitioner submits that the petitioner was ever ready willing to bear the charges of the arbitration agreement and award being engrossed into a stamp paper even though it does not need registration as under the award no present interest has been created in any immovable property. As per the award the eighth respondent after the award was passed has to be given in future the property bearing door No.183-A, Gandhi Road, Kancheepuram and cash of Rs.50,000/-. The petitioner submits that the petitioner is prepared to pay the stamp duty and penalty if any levied on the award filed into court for the award being passed into a decree and made a rule of court."

6. From this Mr.R.Krishnamoorthy, learned Advocate General for the respondent wants to argue that there is only a declaration of the right in favour of the petitioner herein and the decree cannot be taken as one which gives a right to possession of the property in dispute. I am afraid I cannot agree with this contention. It is clear from the petition filed by the respondent herein that the respondent has accepted the award, that he sought a decree in terms of the award and also bargained for the decree in question. The decree of the Sub-Court clearly states that the petitioner has to get the shop in Door No.183-A, Gandhi Road, Kancheepuram and also the sum of Rs.50,000/- which is in deposit at the sub-court, to the credit of the O.P. Thus, having obtained a decree to which the respondent was a party, it is too late in the day for the respondent to contend that the decree is only a declaratory one and that the award without registration cannot be the basis for passing a decree. A reading of the award is very clear to the effect that the petitioner has to get the shop at No.183-A, Gandhi Road, Kancheepuram and a sum of Rs.50,000/- from the respondent and he must also execute a release deed in respect of the other family properties and also in respect of the share in the business belonging to the respondent herein.

7. Mr.M.Srinivasan, learned counsel for the petitioner cited the decision of this court in *Poon Cholai Mudaliar v. Chockalingam Mudaliar*, (1974) T.L.N.J.13 wherein a learned single Judge of this Court dealing with a suit for specific performance had occasion to consider as to whether the decreeholder is entitled to claim possession in the execution proceedings. In that context, the learned Judge held that the relief of possession is inherent in the relief of specific performance, for without delivery of possession of the properties, the performance of the contract for sale would be incomplete. The learned Judge further held that specific performance of contract of sale does not merely mean execution of the sale deed. Mere execution of sale deed without putting the property conveyed in the possession of the vendee would be meaningless.

8. In yet another decision cited by Mr.M.Srinivasan in *Debabrata v. Biraj Mohan*, A.I.R.1983 Cal.51 a Bench of the Calcutta High Court has held that

where the court allowed the plaintiff's prayer for specific performance of the contract which itself incorporated a clause for delivery of possession and the decree contained a direction upon the judgment-debtor to sell the suit property to the plaintiff in terms of the agreement, it would necessarily be taken to embody a mandate to fulfil all the terms including the term for delivery of possession, that the fact that the decree was silent with regard to the prayer for possession would be immaterial and that in such a case the principle that a prayer made in the plaint not being allowed must be deemed to have been refused would not apply. After citing the above said decision, Mr.M.Srinivasan also pointed out the offer made by the respondent in his petition filed for the purpose of getting a decree in terms of the award. In that petition, at paragraph 8, the respondent has specifically stated that he is prepared to act as per the award and is prepared to give the property as well as the cash as directed by the arbitrators to get the release deed.

9. In I.A.No.132 of 1972 filed in O.P.No.23 of 1982 the respondent has further stated that he is always willing to act as per the award and is prepared to give the sum of Rs.50,000/- as also the property to the petitioner herein. From these averments, according to the learned counsel Mr.M.Srinivasna, it is clear that the present attitude of the respondent himself in the O.P. and in the interlocutary application filed in the said O.P. leave no doubt, Mr.R.Krishnamoorthy, learned Advocate General refers to the decision in *Ratan Lal v. Prushottam*, (1974)1 S.C.C. 671= (1974)3 S.C.R.109= A.I.R.1974 S.C. 1066 wherein it has been held that an award which requires registration cannot be looked into for passing judgment in terms of the award, if it was not registered. The decision on the facts of the present case will not apply to the present case. There is absolutely nothing in the award to show that the right has been created in the immovable property in favour of the respondent. As I have observed already, it is clear from the award that the petitioner herein has to get these properties from the respondent and that the petitioner has to execute a release deed by virtue of the same. Even apart from the fact that the petitioner has to get the properties from the respondent, it may be noted that the respondent himself bargained for such a decree to be passed after agreeing that he is prepared to give possession of door No.183-A shop, Gandhi Road, Kancheepuram and also a sum of Rs.50,000/- As a matter of fact, he has deposited the sum of Rs.50,000/- to the credit of the said O.P. as well. Thus, the facts of this case clearly establish that the decree in terms of the award is not a declaratory one, but the petitioner is entitled to get possession by executing the same. The court below has failed to consider all these aspects of the case and has fallen into an error by refusing to execute the decree which has already become final. At this execution stage, we are only concerned with the decree as it stands and the respondent cannot go behind the decree and say that it is not executable. It is the respondent who bargained for the said decree and that decree as discussed above is executable for getting possession of the property after the petitioner executing the release deed. It is said that the respondents deposited the sum of Rs.50,000/- into the court and the petitioner herein has also withdrawn the said amount. The petitioner is prepared to execute the release deed as per the award and the decree and file it into the executing court before he gets an order for possession in the E.P. filed before the executing court. It is made clear that the petitioner has to execute the release deed as per the award and the decree and file it before the executing court before he proceeds with the execution petition when it is taken up for hearing. The petitioner can execute the decree for taking possession of door No.183-A shop, Gandhi Road, Kancheepuram. For all these reasons, the civil revision petition is allowed. There will be no order as to costs in this petition.

R.S. ---- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *K.Shanmukham, J.*

*S.A.No.1126 of 1979. 11*th* *January,* 1984.

Kanakammal *Appellant**

v.

K.A.Vajjiravelu and another *Respondents.*

(A) Dead - Settlement by father in favour of sons - Donees given absolute interest - Condition attached that donee should in case he desired to sell offer to the other donees - Nature of restraint.

(B) Pre-emption - Created by agreement of parties - Validity - Suit for cancellation of sale made to strangers and injunction to restrain - Maintainability.

It is well-settled that parties can agree to a clause whereby a right of pre-exemption is created. In this case all the sons of the settlor got their respective properties under a gift deed. The settlor, being anxious that the property should not go out of the family as far as possible, incorporated a covenant in the original document that should any of his sons sell his property, he shall sell the same to any of his other sons according to the prevalent market rate. Such a clause of pre-emption is not an absolute restraint on the rights conferred on the sons by the settlor. It is only a partial restraint. For instance, if none of the other sons is willing to purchase notwithstanding the offer made by the son who proposes to sell, he has the unfettered right to alienate the property to whomsoever he likes. This will demonstrate that the restraint imposed on the settlees under the document is but partial. *[Para.5]*

The objection that the suit as framed was not maintainable and the proper remedy would be a declaration of the invalidity of the sale is untenable. The court can mould the relief in the interests of justice so long as there are enough materials in the plaint and the evidence to sustain such a relief. Also where the party seeking relief has no title but only a right to call upon the seller to offer the property to him first there is no illegality in his seeking cancellation of the deed of sale in favour of the third person.

Cases referred to:-

Radha Sundar v. Mohd. Jahadur Rahim, 1959 S.C.J.212= 1959 S.C.R.1309= A.I.R. 1959 S.C.24; *Arumuga Chettiar v. Ganapathy Chettiar,* (1982) 95 L.W. 681; *Vellaya Konar v. Ramaswami Konar,* (1939)2 M.L.J.400= I.L.R. (1940) Mad.73= A.I.R. 1939 Mad.894; *C.R.Ramaswami Ayyangar v. C.S.Rangachariar,* (1940)1 M.L.J. 32= I.L.R. (1940) Mad.259= A.I.R.1940 Mad.113; *Kadir Pillai v. Sathyabhama Ammal,* (1963) K.L.T.355; *Bishan Singh v. Khayan Singh,* 1958 S.C.J.1234= (1959) S.C.R.878= A.I.R.1958 S.C.838.

V.Sridevan, for Appellant.

K.Doraiswamy, for Respondents.

The Court made the following

JUDGMENT:- The first defendant who was unsuccessful in both the Courts below is the appellant in this second appeal.

2. The first respondent brought O.S.No.155 of 1976 on the file of the District Munsif's Court, Tirupattur, for setting aside the sale deed dt. 1.6.1973 executed by the second respondent (second defendant) in favour of the appellant (first defendant) under Ex.B-1 and for an injunction restraining the appellant from interfering with the suit property in any manner by altering or making any construction in the suit property. To support the said claim the first respondent relied upon Ex.A-1, settlement deed executed by the father of the parties in favour of his five sons. The plaintiff and the second respondent are two among them. Ex.A-1 besides conferring absolute right on the donees, in the later part provided that if any of his five sons

were to dispose of the respective property that was allotted to him therein out of necessity, such son shall sell the same to any one among his brothers according to the market rate. It is needless to state that the covenant has only created a right of pre-emption in favour of every one of the sons as against the rest if that son were to alienate the property that was gifted to him under Ex.A-1. It is common ground that under Ex.B-1 dt. 1.6.1973, the second respondent sold the property to the appellant and according to the first respondent, no offer at all was made to him by the second respondent before he sold the same under Ex.B-1. The first respondent further contends that the second respondent is bound by the covenant contained in Ex.A-1 and that, therefore, any sale more so Ex.B-1 sale, will not prevail over his right of pre-emption unless there had been a notice by the second respondent offering the property for sale to him and to his brothers. It is on that basis that the first respondent had claimed the two reliefs aforesaid.

3. Both the courts below upheld the first respondent's contention and therefore decreed the suit as prayed for. Hence the second appeal.

4. Mr.Sridevan, learned counsel for the appellant, raises four points before me one of them being the substantial question of law formulated at the time of the admission of the second appeal. They are:-

(i) When in Ex.A-1 an absolute interest is created in the earlier part of the document, the later part imposing a condition that any sale by any one among them should be to his brothers will amount to an absolute restraint and will run counter to the absolute interest that was created in the earlier part of the agreement and therefore, the later covenant is void.

(ii) Even assuming that the condition is a partial restraint, the second respondent did issue Ex.B.2 notice which was acknowledged by the first respondent under Ex.B-3; nevertheless, the first respondent had not exercised his option to purchase the property and therefore, any right of pre-emption was lost to the first respondent. Incidentally, the learned Counsel submitted that the learned Subordinate Judge had not at all considered Ex.B-2 and therefore, at any rate, the matter has to be remitted to the first appellate court for fresh disposal.

(iii) The suit as laid for cancellation of sale deed and for permanent injunction is not maintainable. The proper remedy to have asked for is a declaration that Ex.B-1 sale deed is not binding on the first respondent. It is also contended that even if the sale deed were to be cancelled, the first respondent would not become the owner of the property. With a certain amount of vehemence, the learned counsel further urged that in the copy of plaint served on him, the deletion of prayer (b) was not carried out and that, therefore, all the while the appellant was under the impression that in that suit declaration also was claimed and therefore, no specific plea that the suit is not maintainable as it is framed could not be raised and was not raised.

(iv) The last submission is, in the teeth of Ex.B-1 sale, the first respondent ought to have enforced the pre-emption clause and asked for specific performance.

5. Let me deal with the points in the order in which they are set out above. It is well settled that the parties can agree to a clause whereby a right of pre-emption is created. In this case, all the sons of Arumuga Mudaliar, the settlor under Ex.A-1, got their respective properties under the said gift deed. While making the gift the settlor was anxious that the property should not go out of the family as far as possible. It is therefore that he incorporated a covenant in the original of Ex.A-1 that should any of his sons sell his property for necessity, he shall sell the same to any of his other sons according to the then prevalent market

with what was hereto-before known as the Hindu Women's estate. The proviso will apply only to such cases which flow beyond the purview of the Explanation to section 14(1).

(3) That the proviso would not apply to any grant or transfer in favour of the widow hedged in by limitation or restrictions, where the grantis merely in recognition or declaration of a pre-existing right. It will apply only to such a case where a new right which the female did not possess at all is sought to be conferred on her under certain limitations or exceptions. In fact in such a case even if a conditional grant is made to a male, he would be bound by the condition imposed. The proviso wipes out the distinction between a male and female in this respect. *[Para.70]*

We would now like to summarise the legal conclusions which we have reached after an exhaustive considerations of the authorities mentioned above on the question of law involved in this appeal as to the interpretation of section 14(1) and (2) of the Act of 1956.

These conclusions may be stated thus:-

(1) The Hindu female's right to maintenance is not an empty formality or an illusory claim being conceded as a matter of grace and generosity, but in a tangible right against property which flows from the spiritual relationship between the husband and the wife and is recognised and enjoined by pure Shastric Hindu Law and has been strongly stressed even by the earlier Hindu jurists starting from Yajnavalkya to Manu. Such a right may not be a right to property but it is a right against property and the husband has a personal obligation to maintain his wife and if he or the family has property, the female has the legal right to be maintained therefrom. If a charge is created for the maintenance of a female, the said right becomes a legally enforceable one. At any rate, even without a charge the claim for maintenance is doubtless a pre-existing right so that any transfer declaraing or recognising such a right does not confer any new title but merely endorses or confirms the pre-existing rights.

(2) Section 14(1) and the Explanation thereto have been couched in the widest possible terms and must be liberally construed in favour of the females so as to advance the object of the 1956 Act and promote socio-economic ends sought to be achieved by this long needed legislation.

(3) Sub-section (2) of section 14 is in the nature of a proviso and has a field of its own without interfering with the operation of section 14(1) materially. The proviso should not be construed in a manner so as to destroy the effect of the main provision or the protection granted by section 14(1) or in a way so as to become totally inconsistent with the main provision.

(4) Sub-section (2) of section 14 applies to instruments, decrees, awards, gifts, etc, which create independent and new titles in favour of the females for the first time and has no application where the instrument concerned merely seeks to confirm, endorse, declare or recognise pre-existing rights. In such cases a restricted estate in favour of a female is legally permissible and section 14(1) will not operate in this sphere. Where however, an instrument merely declares or recognises a pre-existing right, such as a claim to maintenance or partition or share to which the female is entitled, the sub-section has absolutely no application and the female's limited interest would automatically be enlarged into an absolute one by force of section 14(1) and the restrictions placed, if any, under the document would have to be ignored. Thus, where a property is allotted or transferred to a female in lieu of maintenance or a share at partition, the instru-

ment is taken out of the ambit of sub-section (2) and would be governed by section 14(1) despite any restrictions placed on the powers of the transferee.

(5) The use of express terms like "property acquired by a female Hindu at a partition", "or in lieu of maintenance" or arrears of maintenance" etc, in the Explanation to section 14(1) clearly makes sub-section (2) inapplicable to these categories which have been expressly excepted from the operation of sub-section (2).

(6) The words "possessed by" used by the Legislature in section 14(1) are of the widest possible amplitude and include the state of owning a property even though the owner is not in actual or physical possession of the same. Thus, where a widow gets a share in the property under a preliminary decree before or at the time when the 1956 Act had been passed but had not been given actual possession under a final decree, the property would be deemed to be possessed by her and by force of section 14(1) she would get absolute interest in the property. It is equally well settled that the possession of the widow, however, must be under some vestige of a claim, right or title, because the section does not contemplate the possession of any rank trespasser without any right or title.

(7) That the words "restricted estate" used in section 14(2) are wider than limited interest as indicated in section 14(1) and they include not only limited interest but also any other kind of limitation that may be placed on the transferee."

18. It is not necessary to refer to the other cases, because the position of law is very clear from the above judgments, which have stood to the test of time. We are totally unable to accept the argument of Mr.T.R.Ramachandran, learned counsel appearing for the plaintiff that prior to 1956 when the testator executed a will he merely declared the then existing law that the daughter will be entitled only to a limited estate. No doubt the Explanation to section 14(1) uses the word DEVISE. That devise according to him is Exhibit A-3 in this case. This argument ignores the wording of section 14(1) which are very relevant for our purpose. The will itself got interposed before the statutory right would take in. If, therefore by the terms of Exhibit A-3 the daughter had obtained a restricted right then that term will govern and therefore section 14(2) alone will come into play. Accordingly, we set aside the finding of the learned Subordinate Judge in paragraph 22 with regard to the interpretation of section 14 of the Hindu Succession Act.

19. Lastly turning to the oral arrangement, no doubt the learned Subordinate Judge held to buttress his reasoning, the oral arrangement pleaded in paragraph 12 of the plaint was neither true nor valid, that Subbiah Iyer having executed two prior wills would have certainly executed another will or codicil if there was such an oral arrangement and that by itself will not militate against the other finding, to conclude there was no oral arrangement. First of all, the terms of such arrangement have not been proved at all. Secondly, there are no records to show that the 8th defendant has given up her share, while there is Exhibit B-17 in respect of item No.1 of the suit property. Thirdly, even as early as in 1963 the house tax demand notice was only on defendants 1 and 8 as evidenced by Exhibit B-1. Likewise notice under Exhibits B-2, B-10, and B-11, demanding taxes, were only on defendants 1 and 8. Similarly are notices Exhibits B-3 and B-5. Fourthly Mangalam was collecting rent only by reason of arrangement between parties.

20. Exhibit A-7 cannot advance the case of the appellants in Appeal No.669 of 1978 (plaintiffs),because Exhibit A-7 is evidently after the suit. Inasmuch as that deals with properties not included in the will, it can have no bearing whatever. Accordingly we uphold the finding of the learned Subordinate Judge that the oral family arrangement pleaded

in paragraph 12 of the plaint is neither true nor valid.

21. In the result, Appeal No.389 of 1978 is allowed and Appeal No.669 of 1978 is dismissed. We make it clear that the result of this will be that item 4 of the plaint schedule which is equivalent to item 2 E-schedule of Exhibit A-3 will stand excluded from the purview of partition. In other respects, the decree of the trial court will stand confirmed. The parties are directed to bear their respective costs in these appeals.

R.S. — *Appeal 389/78 allowed.*
Appeal 669/78 dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *V.Ramaswamy and David Annoussamy, JJ.*

*C.S.No.591 of 1981. *17th September, 1984.*

Bank of Madurai Ltd *Plaintiff**

v.

Balaramadass and Brothers and others *Defendants.*

Letters Patent (1865), Madras, Clause 12 - Jurisdiction of High Court - Suit on equitable mortgage by deposit of title deeds - Property situated in Ootacamand - Mortgage by deposit of title deeds created at Madras - All the defendants residing at Madras - Madras High Court whether has got jurisdiction to hear the suit.

The point for determination in the suit was whether the Madras High Court has jurisdiction to hear a suit on a mortgage by deposit of title deeds created at Madras irrespective of the situs of immovable property when all the defendants reside at Madras.

Held:- The High Court has jurisdiction to hear a suit whatever be the nature of the suit, in case the defendants reside within its territotrial jurisdiction. This stems from a careful reading of clause 12 of the Letters Patent of 1865. One may say that the reasons which militated for endowing the High Court in Madras with a jurisdiction different from that in the mofussil do no longer exist and that the universal rule of forum loci in respect of immovables should apply also to the High Court of Judicature at Madras. In fact, that would be a step in the right direction and that would alleviate the burden of the original jurisdiction of this Court. But that step has to be achieved through a legislative process. Pending such a legislative action, the law as it is has to be applied and the law, as stated is to the effect the High Court has full jurisdiction to hear a suit when the defendants reside within its territorial jurisdiction, irrespective of the place of the immovable property. *[Para.10]*

Cases referred to:-

State Industries Promotion Corporation of Tamil Nadu Ltd. v. Arvind Distillery and Chemicals Ltd., (1982)1 M.L.J.188: A.I.R.1982 Mad.273; *Seshagiri Rao v. Rama Rao*, (1896) I.L.R.19 Mad.448: 6 M.L.J.19.

Somayajee of Aiyar and Dolia, for Plaintiff.

K.V.Rajan, for Defendants.

The Judgment of the Court was delivered by

David Annoussamy, J.:- This is an order of reference from a learned single Judge of this Court on the point of jurisdiction.

2. The suit is one on equitable mortgage by the deposit of title deeds for sale of the immovable property situated in Ooty, outside the territorial jurisdiction of this Court. The mortgage by deposit of title deeds was created at Madras and all the defendants reside in Madras. It was contended by the defendants that this Court had no jurisdiction to entertain the suit. The plaintiff retorted that a suit on mortgage for sale of the mortgage property was not a suit for land and that, therefore, was within the jurisdiction of this Court.

3. The controversy between the parties, therefore, turned on the point whether a suit on mortgage for sale of the mortgaged property was one for land or not. The learned single Judge after reviewing the position of law on this question found that he could not agree with the view taken recently by another single Judge, in the *State Industries Promotion Corporation of Tamil Nadu Ltd. v. Arvind Distillery and Chemicals Ltd*; (1982)1 M.L.J.188: A.I.R.1982 Mad.273. Consequently, he passed an order referring the above question to a larger Bench.

4. In the Course of arguments on the above point the fact that all the defendants are residing within the territorial jurisdiction of this Court was highlighted. If such is the case, the question whether a suit on mortgage for the sale of the mortgaged property is a suit for land or not may not arise at all in this case. It is to this aspect of the question that we shall advert now. The original jurisdiction of this court in civil matters is indicated in Cl.12 of the Letters Patent, 1865. That clause reads as follows:-

"And we do further ordain that the said High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction shall be empowered to receive, try and determine suits of every description, if, in the case of suits for land or other immovable property such land or property shall be situated, or in all other cases, if the cause of action shall have arisen either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell or carry on business or personally works for gain, within such limits; except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Madras, in which the debt or mortgage, or value of the property sued for does not exceed one hundred rupees."

In order to understand quickly and easily, this clause which is somewhat clumsily drafted, the relevant portion of the clauses may be re-written as follows:-

1. If, in the case of suits for land or other immovable porperty such land or property shall be situated 2. Or, in all other cases, if the cause of action shall have arisen	either wholly, or in case the leave of the Court shall have been first obtained, in part	within the local limits of the ordinary original jurisdiction of the said High Court.
3. Or, if the defendant at the time of commencement of the suit shall dwell or carry on business, or personally work for gain		within such limits

Grammatically, this is the only reading possible in view of the respective places in the sentence of the phrases 'within the local limits of the ordinary original jurisdiction of the said High Court and 'within such limits'. Any other reading would be illogical. The resulting position is that this court has jurisdiction when the defendant resides within the local limits, wherever the property may be situated.

5. It is seen that in the first two parts, the jurisdiction is determined with reference to the subject-matter, whereas in the third part the jurisdiction is indicated with reference to the parties to the suit independently from the first two parts. So, the expression in all other cases found in the sentence does not take within its ambit the case when the defendants reside within the territoral jurisdiction of this court. It has application only when the third clause is not pressed into service. This clause 12 of the Letter Patent, 1865, makes an exception to the universal principle of granting jurisdiction in respect of immovable property to the Court within the jurisdiction of which the immovable property is situate. The rule of forum loci has been deliberately omitted in respect of the High Court. This has been confirmed by the provisions of section 130 of C.P.C. stating that the provisions of sections 16, 17 and 20 shall not apply to the High Court in the exercise of its original civil jurisdiction.

6. No previous decision of this Court or of another chartered High Court was produced before us in respect of this question. The only judgment which was brought to our notice is one in *Seshagiri Rao v. Rama Rao*, (1896) I.L.R.19 Mad.448= 6 M.L.J.19 wherein though the <u>defendants are said to reside in Madras</u> (underlined supplied) the question of jurisdiction was not at all considered from that angle. But we are comforted in our view after the perusal of Clause 12 of the Letter Patent, 1862, which is quite different from Clause 12 of the Letters Patent, 1865, and which runs thus:-

"And we do further ordain that the said High Court of Judicature at Madras, in the exercise of its ordinary original civil jurisdiction, shall be empowered to receive, try, and determine suits of every description, if in the case of suits for land or other immovable property shall be situated, or in all other cases if the cause of action shall have arisen, or the defendant at the time of commencement of the suit shall dwell, or carry on business, or personally work for gain, within the local limits of the ordinary original jurisdiction of the said High Court, except that it shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Madras, in which the debt or damage, or value of the property sued for does not exceed one hundred rupees."

The way in which this clause was drafted especially the fact that the phrase 'within the local limits of the ordinary original jurisdiction of the said High Court', is found only once at the end of the sentence shows clearly that as per this clause there was on one side suits for land and on another side all other suits including those in which the defendants reside within the territorial jurisdiction. In this clause, the phrase in all other cases encompasses the case of the defendant residing within the jurisdiction. It is interesting to note that this clause contains the same provision as the one contained in section 5 of the First Civil P.C. dt. 22-3-1859. The universal rule of forum loci adopted in the Civil P.C. was also made applicable to the High Court in 1862. This is made clear in para 17 of the despatch from the Secretary of State dt. 14-5-1862. The relevant extract of para 17 is given below:-

"The terms of Clause 12 defining the original jurisdiction of the High Court as to suits, are nearly similar to those employed in section 5 of the Civil P.C. (Act VIII of 1859), and are intended to include every description of case over which the Mofussil Courts have jurisdiction . . . It has, therefore been sought to invest the High Court, in the exercise of its original civil

jurisdiction with ample powers in receiving and determining cases of every description, and in applying a remedy to every wrong as are exercised by the Courts not established by Royal Charter, and thus to place the Courts of first instance in the Presidency Town and in the interior of the country in this respect, as nearly as may be, on the same footing."

This solution, however, was not found suitable, so there was a substantial modification in the subsequent Letters Patent, 1865, which is now in force, and where an exception is made in respect of the High Court to the rule of forum loci in respect of suits on immovables. It is for this reason that in all the subsequent Civil P.C. right from the Code of 1877, a clause is inserted to the effect that sections 16, 17 and 20 of the Civil P.C. would not apply to High Courts. Those sections precisely, for the purpose of jurisdiction, make a fundamental distinction between suits on immovables and all other suits. In this connection it has to be remembered that the Letters Patent of 1862 were provisional in nature and were to be modified within three years in the light of the experience gained.

7. Para 7 of the despatch from the Secretary of State dt. 14-5-1862 is emphatically clear on the above point and it reads as follows:-

"Another reason for the form which the present Letters Patent assume is to be found in the provisions of section 17 of the Act of last sessions. By that section power is given to the Crown to recall the Letters Patent establishing the Courts at any time within three years after its establishment, and to grant other Letters Patent in their stead. This provision was inserted in the Act, mainly with the view of enabling Her Majesty's Government to avail themselves of the advice and assistance of the Judges of the Court in framing the more perfect Charter by which the jurisdiction and authority of the Court is to be permanently fixed. On this point, I request you will put yourselves in communication with the Judges of the Court, and, at any time previous to the expiration of two years from the date of establishment of the court, furnish me with any suggestions they make, or any amendments they may propose in the Letters Patent now transmitted, and I shall be glad, if in proposing alterations, the Judge will put their recommendations as early as possible in the form in which they wish them to appear in the future Letters Patent."

So clause 12 in the Letters Patent of 1865 is different from clause 12 in the Letters Patent of 1862 and has made a deliberate departure from the solution adopted in 1862 and which attempted to bring similarity between the High Court and Mofussil Courts in matters of jurisdiction. We further find that in the Letters Patent of 1865 the position as it prevailed prior to 1862 has been restored. In fact, the Letters Patent dt. 26-12-1800 through which a Supreme Court of Judicature was established in Madras to which the High Court is a successor Court provides as follows:

"And we do hereby further direct and ordain, that the said Supreme Court of Judicature at Madras, shall have full power to hear and determine all suits and actions that may be brought against the inhabitants of Madras."

This makes clear that the intention of the Legislature in the Letters Patent of 1800 as well as 1865 is to give the Supreme Court and then to the High Court jurisdiction over suits, whatever be their nature, when the defendants reside in Madras. This deliberate departure from the universal principle of forum loci in respect of suits on immovable is due to historical reasons.

8. In the early period the British were having only settlements and restricted rights. It is in the course of time that they have progressively expanded their power over the country. The first courts created by them were mainly for the British and other Europeans and also for those residing within the

limits of their settlements. When Courts were later created in the mofussil in the beginning of the 19th Century, the original distinction continued to survive as they were very keen to afford a justice of their own to the British subjects not only in respect of law and procedure applied but also in respect of persons administering justice. This is the reason why the Court established in Madras under various names was having powers, prerogatives and jurisdiction different from the courts established in mofussil. The position is the same in respect of courts in Calcutta, Bombay and Rangoon. On the contrary the High Courts of Patna, Allahabad and Lahore where there was no important British population do not have any ordinary original civil jurisdiction at all.

9. As far as Madras is concerned, the first court created by Charter dt. 30-12-1687 under the name of Mayor's Court had power to try and adjudge all cases, whatsoever, criminal and civil, that shall be brought before that. The jurisdiction of the Court was thus left to the option of the parties. By Charter dt. 24-9-1726, the Mayor's court was authorised to try, hear and determine all civil disputes that shall arise or may arise or happen within the said town of Madras or within any of the Factories subject or subordinate unto Fort St. George aforesaid. By Charter dt. 8-1-1753, the provision as stated above is reiterated with the following addition: except such suits or actions shall be between the Indian natives of Madraspatnam only, in which case we will that the same be determined among themselves, unless both parties shall by consent submit the same to the determination of the said Mayor's Court. This addition takes into account the large population of the Indian natives who had gathered at the time at Madras. Later, Letters Patent dt. 20-2-1798 was issued when the power of the British got firmly established and a Recorder's Court was created in the place of Mayor's Court. The relevant portion of that Charter is as follows:-

"t[illegible] further direct, ordian and t[illegible]int the jurisdiction, powers [illegible] authorities of the said Court of [illegible] Recorder of Madras, shall extend [illegible] British subjects, who shall [illegible] within any of the factories, s[illegible] to, or dependent upon the Go[illegible]ment of Madras; and that the said Court shall be competent and effectual, and shall have full power and authority to hear and determine all suits and actions, whatsoever, against any of our said subjects, arising in territories subject to, or dependent upon or, which hereafter shall be subject, to, or dependent upon the said Government or within any of the Dominions of the Native Princes of India, in alliance with the said Government, or against any person or persons who, at the time when the cause of action shall have arisen, shall have been employed by, or shall have been directly or indirectly, in the service of the said united company, or any of the said subjects of us, our heirs, or successors . . . And we do hereby further direct and ordain, that the said Court of the Recorder of Madras shall, according to the said recited Act of Parliament of the Twenty-Seventh Year of our Reign, have full power to hear and determine all suits and actions, that may be brought against the inhabitants of Madras." (unlderlined supplied)

It is this last provision that has been reproduced in the Charter of 1800 establishing the Supreme Court of Judicature at Madras and in a different forum in the Letters Patent of 1865 after an eclipse of 3 years following the Letters Patent of 1862.

10. It is thus clear, that this Court has jurisdiction, whatever be the nature of the suit, in case the defendants reside within its territorial jurisdiction. This results out of a careful reading of clause 12 of the Letters Patent of 1865 and the justification for this extraordinary rule is supplied by the historical process. One may say that the reasons which militated for endowing the High Court in Madras with a jurisdiction different from that in

the mofussil do no longer exis[illegible] that the universal rule of forum [illegible] in respect of immovables should a[illegible] also to the High Court of Judicat[illegible] at Madras. In fact, that would be [illegible] step in the right direction and tha[illegible] would alleviate the burden of the original jurisdiction of this Court. But that step has to be achieved through a legislative process. Pending such a legislative action, the law as it is has to be applied and the law, as stated earlier, is to the effect that this Court has full jurisdiction to hear a suit when the defendants reside within its territorial jurisdiction, irrespective of the place of the immovable property.

11. Since, admittedly in the present suit, all the defendants reside within the territorial jurisdiction of this Court, this Court has clear jurisdiction to entertain the suit and for the same reason the question referred to us, as to whether the suit is one for immovable or not does not arise and the same need not be gone into this case. The reference is answered accordingly.

R.S. ----- *Reference answered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *R.Sengottuvelan, J.*

*Petition No.49 of 1983. 28*th January,* 1985.

TR.Deivanai Achi *Petitioning Creditor**

v.

K.S.D. Radhakrishnan, Sole Proprietor, Prema Coffee Works, Madras-4 *Debtor.*

(A) Presidency Towns Insolvency Act (III of 1909), section 9(2)(5)(c) - Scope and applicability - Meaning of the words "not executable" occurring in clause (c) - Restricted to cases where decree cannot be executed on account of special circumstances.

(B) Civil Procedure Code (V of 1908), Order XXI, Rule 22 - Decree more than two years old - Cannot be executed unless a show cause notice is issued to the judgment-debtor.

In this case the decree is dated 21-2-1977 and the last E.P. was dismissed on 1-8-1980. The application for issuing an insolvency notice was filed on 29-4-1983 more than two years after the dismissal of the last E.P. Under Civil Procedure Code, Order XXI, rule 22 the petitioner is not entitled to proceed in execution unless a notice is issued to the respondent to show cause why the decree should not be executed. The amendment however of section 9(2) of the Presidency Towns Insolvency Act, restricts the term "not executable" occurring in section 9(2)(5)(c) to cases where the decree could not be executed on account of the special enactments relating to relief of indebtedness referred to in section 9(2)(5)(b). The creditor's application to adjudicate the debtor is therefore competent. *[Para.7]*

Case referred to:-

Bhurmal Kapurchand and Co., v. P.M.Tools Co., A.I.R.1977 Bom.305.

The Court delivered the following

JUDGMENT:- This is an application by the creditor under sections 9(2), 10,11,12 and 13 of the Presidency Towns Insolvency Act III of 1909, for adjudicating the respondent as insolvent on the ground that the petitioner had obtained a decree against the respondent in O.S.No.382 of 1975 on the file of the City Civil Court, Madras, for a sum of Rs.5,050/- together with interest on Rs.5,000/- at 24% per annum from the date of claim, viz. 18-7-1977 till the date of decree and thereafter at 6% per annum till the date of realisation and costs. The said decree is marked as Exhibit P-1. It is also alleged in the petition that the petitioner had applied for the issue of insolvency notice in Application No.15/83 and the same also had been ordered by this court on 29-4-1983. The respondent had also filed an application No.195 of 1983 to set aside the insolvency notice and the same was dismissed on 12-9-1983. Hence, the petitioner has come forward with this application for adjudicating the respondent as an insolvent.

2. In the counter statement, the respondent states that the respondent had dealings only with Thirunavukkarasu Chettiar, P.W.1, who is none other than the husband of the petitioner and the respondent did not have any dealing with the petitioner directly. In respect of the two transactions the respondent had with Thirunavukkarasu Chettiar by which the respondent had borrowed Rs.1,500/- on each occasion, the respondent issued blank cheques, containing only his signatures and they were blank regarding date, payer's name and the amount. As supporting documents, the respondent executed two promissory notes and out of the two promissory notes which are subjectmatter of the suit O.S.No.3821 of 1975, one promissory note was blank except for the amount which was filled in as Rs.1,500/-; but the promisee's name and date were kept blank. As regards the other promissory note, the amount, date and name of the promissee were kept blank. It is stated in the counter statement that the said Thirunavukkarasu Chettiar had filed the promissorty notes and obtained a decree. It is also alleged if the value of jewels entrusted by the respondent to P.W.1 is taken into account, no amount is really due to the petitioner. The second contention raised on behalf of the respondent is that in any event, the decree in O.S.No.3821 of 1975 is more than two years old and the last E.P. filed by the petitioning creditor, viz. 1430 of 1979 was dismissed on 1-8-1980 and more than two years have elapsed after the disposal of E.P.No. 1430 of 1979 and as such, the decree in O.S.No.3821 of 1975 is not executable straightaway. It is also pointed out that according to Order XXI, Rule 22 of the Code of Civil Procedure, a decree more than two years old cannot be executed unless a show cause notice is issued to the judgmentdebtor.

3. The points for determination in this Insolvency petition are:

(1) Whether the contention of the respondent that no amount is due under the decree can be accepted?

(2) Whether the legal contention raised on behalf of the respondent that the decree is not executable under section 9(2)(5)(c) of the Presidency Towns Insolvency Act is sustainable?

4. The petitioner's husband was examined as P.W.1. He spoke to the fact that his wife, the petitioner herein had obtained a decree against the respondent, which is marked as Ex.P-1 as stated above, and that an insolvency notice has been issued by the petitioner as per Ex.P-2 and that the decree still remains unsatisfied and the petition filed to set aside the insolvency notice was dismissed by this Court.

5. On behalf of the respondent, the respondent was examined as R.W.1 and he has deposed to the averments made in the counter and also filed Ex.R-1, the certified copy of the order made in the last E.P. stating that the E.P. was dismissed more than two years prior

to the filing of the Insolvency Petition on 1-8-1980.

6. In so far as the first contention that no amount is due under the decree in O.S.No.3821 of 1975 of the City Civil Court, Madras, is concerned, the contention on the part of the respondent cannot be accepted since the very same plea was put forward before the trial court at the time of the application for leave to defend and was rejected by the City Civil Court. The respondent also filed a Civil Revision Petition against the orders of the City Civil Court and the C.R.P. was dismissed even at the admission stage. He has put forward similar contention in E.P.1430 of 1978, the final order copy of which is marked as Ex.R-1 and the same was also negatived by the executing Court and the same plea was raised in the application to set aside the Insolvency Notice before this court and this court also had negatived the same. Under the circumstances, it is too late in the day for the respondent to raise the same plea once again in defence to this insolvency application. Hence, the first contention of the respondent will have to be rejected.

7. In so far as the second contention is concerned, it is the case of the respondent that in any event the decree is not executable and the Insolvency Application cannot be based on the same. The decree is dated 21-2-1977 and the last E.P. viz. E.P.No.1433 of 1979 was dismissed on 1-8-1980. The application for issuing insolvency notice was filed on 29-4-1983 more than two years after the dismissal of the last E.P. Hence, it is contended that under Order XXI, Rule 22 of the Code of Civil Procedure the petitioner is not entitled to proceed in execution unless a notice is issued to the respondent to show cause why the decree should not be executed. In support of his contention, reliance is placed upon a judgment of the Single Judge of Bombay High Court in A.I.R.1977 Bombay 305 *Bhurmal Kapurchand and Co. v. P.M.Tools Co.*, where it is observed as follows:-

"16. In the light of the principle laid down by the Privy Council, the Privy Council upheld the contention of the judgment-debtor as to the invalidity of the sale for want of leave of the court for execution against legal representative. The same principle must also apply to a case where the leave of the court is necessary in regard to a decree which is more than two years old because in principle there can be no distinction between the two situations in so far as the requirement of the leave of the court is concerned. I therefore, must hold that in absence of leave under Order 21, rules 22 and 23, of the Code of Civil Procedure, it is not open to the judgment creditors herein to execute the said decree. The execution of the said decree is not permissible under the provisions of the Code of Civil Procedure. It must also be held that the judgment-creditors herein are not entitled to resort to any equitable mode of execution thereof. This is further buttressed by the principle that if it is not permissible for the judgment creditors to execute the decree under the provision of the Code of Civil Procedure directly, this Court in exercise of its discretion will not allow the judgment-creditors to execute the said decree indirectly by circuitous method of insolvency proceedings."

The principles laid down in the judgment of the Bombay High Court had been whittled down by an amendment of section 9(2) of the Presidency Towns Insolvency Act, wherein the term 'not executable' occurring in section 9(2)(5)(c) is restricted only to cases where the decree cannot be executed on account of the special enactments relating to relief of indebtedness referred to in section 9(2)(5)(b). The said amended section can usefully be extracted:

"9(2)(5) Any person served with an Insolvency Notice may, within the period specified therein for its compliance, apply to the Court to

set aside the insolvency notice on any of the following grounds, namely:-

"(a) that he has a counter claim or set off against the creditor which is equal to or is in excess of the amount due under the decree or order and which he could not, under any law for the time being in force, prefer in the suit or proceeding in which the decree or order was passed;

(b) that he is entitled to have the decree or order set aside under any law providing for the relief of indebtedness and that -

(1) he has made an application before the competent authority under such law for the setting aside of the decree or order; or
(ii) the time allowed for the making of such application has not expired;

(c) that the decree or order is not executable under the provisions of any law referred to in clause (b) on the date of the application."

In view of the amendment, the principle laid down in the decision of the Bombay High Court, cannot be made applicable to the facts of this case.

8. The respondent also relies upon the passage in Williams and Muir Hunter's the Law and Practice in Bankruptcy, nineteenth edition, page 32, where the words "being a decree or order which has become final and the execution whereof is not stayed" used in section 9(5)(2) of the Presidency Towns Insolvency Act had been explained as follows:-

"These words include cases where the creditor at the time the notice is issued is not in a position to issue execution as well as those where execution has been stayed."

The respondent also relies on a passage in the Law of Insolvency in India by Mulla, 3rd Edition, page 100, where the words "execution of which is not stayed" occurring in section 9(2)(2) of the Presidency Towns Insolvency Act is explained as follows:-

"The words "execution of which is not stayed" ("execution thereon not having been stayed") are not confined to cases where there has been an express stay of execution but cover all cases in which the creditor at the time when the bankruptcy notice is issued, is not in a position to issue execution."

The above two passages also are of no avail in view of the amendment to section 9(2) of the Presidency Towns Insolvency Act, referred to above. Hence, the said legal contention raised on behalf of the respondent also cannot be accepted.

9. In the result, the petitioner has made out a case for adjudicating the respondent as insolvent and consequently, the application is allowed and the respondent is adjudged as insolvent and the assets of the respondent will vest with the Official Assignee. Costs will come out of the estate.

R.S. ----- *Application allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *S.Nainar Sundaram, J.*

*C.R.P.No.1935 of 1984. *26th October, 1984.*

R.Viswanathan *Petitioner**

v.

P.Shanmugham and another *Respondents.*

Civil Procedure Code (V of 1908), Order 26, rule 10(3) - Scrapping of earlier report of Commission as a whole and appointment of a fresh Commissioner - Court's power.

It is well settled propositions that until the court is dissatisfied with the proceedings and report of the Commissioner earlier appointed, it will not be proper to ignore the same and direct even further enquiry, much less the scrapping of the earlier report as a whole and appoint a fresh Commissioner. The power is circumscribed by the principles under Order 26, rule 10(3). The power can be exercised only after the Court below renders a finding that the proceedings and the report of the earlier Commissioner are not satisfactory and there is need for a further enquiry. In the present case, the order of the Court below does not express any opinion that the proceedings and the report of the earlier Commissioner are not satisfactory. The Court below has opined that the truth or otherwise of the allegations therein against the Commissioner's report need not be gone into and it is better to change the Commissioner. This is not the proper way of dealing with the matter. *[Para.2]*

Petition under section 115 of Act V of 1908 to revise the order of the District Munsif's Court, Salem, dated 24th September, 1984 in I.A.No.201/84 in O.S.No.1019/84.

T.Somasundaram, for Petitioner.

K.Sarvabhauman, for Respondents.

The Court made the following

ORDER:- The plaintiff in the suit is the petitioner in this revision. The respondents are the defendants in the suit. The suit has been laid for a declaration of the plaintiff's right to drain water of his house and property into the land of the defendants and for a permanent injunction. Pending the suit, the plaintiff sought for the appointment of a Commissioner to note the physical features. The Commissioner appointed by the court below has submitted his report. The defendants subsequently took out I.A.2011 of 1984, to scrap the report of the Commissioner and appoint a fresh Commissioner to note down the physical features. This application has been allowed by the Court below and this revision is directed against the orders of the Court below.

2. It is well settled proposition that until the Court is dissatisfied with the proceedings and report of the Commissioner earlier appointed, it will not be proper to ignore the same and direct even further enquiry, much less the scrapping of the earlier report as a whole and appoint a fresh Commission. The power in this behalf is circumscribed by the principles under Order 26, rule 10(3) of the Civil Procedure Code, hereinafter referred to as the Code. The power has to be exercised only after the Court below renders a finding that the proceedings and the report of the earlier Commissioner are not satisfactory and there is need for a further enquiry. In the present case, the order of the Court below does not express an opinion that the proceedings and the report of the earlier Commissioner are not satisfactory. The court below has opined that the truth or otherwise of the allegations thrown against the Commissioner's report need not be gone into and it is better to change the Commissioner. It has proceeded on the basis that allegations are thrown against the earlier Commissioner and hence, it is not fair to accept his report. This is not the proper method of dealing with an application of the

present nature. These features oblige me to interfere in revision and accordingly this revision is allowed and I.A. No.2011 of 1984 is remitted back to the file of the Court below for it to consider the same in accordance with law, keeping in mind the provisions of Order 26, rule 10(3) of the Code and the judicial pronouncements throwing light on the principles involved. I make no order as to costs.

R.S. ----- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *V.Ramaswamy and David Annoussamy, JJ.*

*W.A.No.534 of 1982. 17th *September, 1984.*

The Committee of the Peoples Co-operative Bank Ltd. No.386 reptd. by its President, P.Kolusiah Pillai *Appellant**

v.

Thew Joint Registrar of Co-operative Societies, Tirunelveli Region, Tirunelveli *Respondents*

Tamil Nadu Co-operative Societies Act (LIII of 1961),section 72(1) - Notice by Joint Registrar of Co-operative Societies to the Co-operative Bank proposing to dissolve its Committee and appoint a special officer to manage the affairs of the Bank - Allegation that the Committee failed to discharge the legitimate duties etc - Committee members called upon to make representations if any - Prior sanction of the Reserve Bank of India if necessary, the Bank being an insured Co-operative Bank - Validity of notice upheld.

The point that arose for consideration was that since the concerned Co-operative Bank was insured Co-operative Bank within the meaning of section 73 - T of the Tamil Nadu Co-operative Societies Act no action for dissolution of the committee was possible without prior sanction of the Reserve Bank of India and since admittedly, there was no such prior sanction of the Reserve Bank of India in this case the whole proceedings initiated were without jurisdiction.

Held:- While section 73-T of the Act made a distinction so far as winding up is concerned by fettering the Registrar to get the previous sanction of the Reserve Bank in case he wants to take action under section 85 it did not provide for any such fetter in the Registrar when he wants to take action under section 72. The section only reserves the power to the Reserve Bank itself to direct action to be taken for supersession of the Committee and it did not fetter the powers of the Registrar for taking *suo motu* action under section 72 without reference to the Reserve Bank. The only fetter on the Registrar under section 72, if at all is that which is provided under section 72(6) itself which requires that before taking any action under sub-section(1) of that section the Registrar shall consult the financing bank to which the society in indebted. Probably that was considered to be sufficient safeguard for retaining the power of the Registrar for superseding the Committee and not requiring the previous sanction of the Reserve Bank itself. Whatever be the reason, on a plain reading of these provisions the court is of the view that the powers of the Registrar under section 72 is not fettered in any way by the provisions of section 72-T (iii). The *non-obstante* clause in the opening paragraph of the Reserve Bank to direct the supersession notwithstanding anything contained in section 72 could not be taken to mean the powers of the Registrar under section 72 is taken away. Therefore the notice issued by the Registrar in this case was well within his jurisdiction and it does not call for any interference. *[Para.3]*

Appeal under clause 15 of the Letters Patent against the order of Mr.Justice Nainar Sundaram dated 16-11-1981 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No.695 of 1981 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records of the 1st respondent in his proceedings R.C.No.6092 of 80-K, dated 20-11-1980 and quash the said order in so far as it effects the petitioner.

Miss O.K.Sridevi, for Appellant.

M.A.Sadanand, Government Advocate for Respondent.

The Judgment of the Court was delivered by

Ramaswami, J. :- The Peoples Co-operative Bank Limited (hereinafter referred to as 'the Co-operative Bank') Nagercoil is a Society deemed to be registered under the provisions of the Tamil Nadu Co-operative Societies Act 1961, (for short 'the Act'). It is an insured Co-operative Bank within the meaning of section 73-T of the Act. It was registered as No.82 under the deposit Insurance and Credit Guarantee Corporation Act, 1961 (Central Act XLVII of 1961) as amended by Act LVI of 1968. In his proceedings Rc.No.62139/80, B-2 dated 4th November, 1980 the Joint Register of Co-operative Societies, Tirunelveli Region (who is deemed to be the Registrar for the purpose of the Act) issued a notice to the Co-operative Bank proposing to dissolve its Committee under section 72(1) of the Act and to appoint a special Officer to manage the affairs of the Co-operative Bank on the ground that the Committee of the Co-operative Bank is not functioning properly, that it has failed to discharge the legitimate duties cast upon it under the By-laws and that the Committee has wilfully disobeyed the By-laws and instructions from the department and that it was necessary to take such an action with a view to safeguard the interests of the members and creditors and to develop the business of the Bank. The members of the Committee were called upon to make their representations, if any, within 15 days of the date of receipt of the notice. Except the President the other six Committee members did not file any representation objecting to the dissolution. Of course, the President filed his representations objecting to the dissolution of the Committee. Before final orders could be made, W.P.No.695 of 1981 was filed by the President of the Co-operative Bank praying for the issue of writ of certiorari to quash the notice dated 4th November, 1980. The only point that was raised against the validity of the notice was that since the Co-operative Bank is an insured Co-operative Bank within the menaing of section 72-T of the Act no action for dissolution of the Committee is possible without prior sanction of the Reserve Bank of India and since admittedly, there was not such prior sanction of the Reserve Bank of India in this case, the whole proceedings initiated are without jurisdiction. The respondent contended that action was taken under section 72 of the Act and that the section specifically enables the Registrar to take action for dissolving the Committee if it is not functioning properly or if it wilfully disobeys the order or wilfully fails to comply with the lawful order or direction issued by the Registrar and that power is not, in any way, affected by the provisions of section 73-T of the Act which contemplates a different situation and an additional jurisdiction to the Registrar. Following an earlier decision of this court in the Committee of Tirukoilur Co-operative Urban Bank Ltd., Tirukoilur by President N.Vadivelu v. Joint Registar Co-operative Societies, South Arcot Region, Cuddalore). W.P.No.6505 of 1980 (judgment dated 9th December, 1980), the learned judge who heard the writ petition dismissed the same holding that the powers of the Registrar under section 72 of the Act is independent of his power under section 73-T and that the notice issued does not suffer

from want of any jurisdiction. In W.P. No.6505 of 1980, which was a decision of a single judge it was held that section 73-T of the Act confers an additional power to the Registrar and that it does not in any way militate against or dilute the power available to the Registrar under section 72. This view of the learned judges is canvassed in this writ appeal.

2. In order to understand the scope of section 72 and section 73-T of the Act it is necessary to trace the legislative history. Chapter IX-D in which section 73-T finds a place was introduced by Tamil Nadu Act 37 of 1979. It may be mentioned that the Parliament enacted a Deposit Insurance and Credit Guarantee Corporation Act, 1961 and that Act came into force on 1-1-1962. The Act was intended to insure all deposits in commercial banks including State Bank and its subsidiaries. Under Chapter II, a Corporation by name the Deposit Insurance Corporation was established. Section 10 provides that the Corporation shall register every existing banking company as an insured bank. Banking Company was originally defined as meaning "a bank which transacts the business of banking in India". This Act was further amended by Act 56 of 1968 in order to enable the Co-operative Banks also to get the benefits of the provisions of the Deposit Insurance and Credit Guarantee Corporation Act 1961. It defined "elegible Co-operative Bank" as meaning "a co-operative Bank the law for the time being governing which provides that:

> (iii) If so required by the Reserve Bank in public interest or for preventing the affairs of the bank being conducted in a manner detrimental to the interests of the depositors or for securing the proper management of the bank, an order shall be made for the supersession of the committee of management or other managing body by whatever name called) of the bank and the appointment of an administrator therefor for such period or periods not exceeding 5 years in the aggregate as may from time to time be specified by the Reserve Bank."

The rest of the definitions is not necessary for the purpose of this case and therefore, we are not extracting the same. Correspondingly the definition of an Insurance Bank was also amended including an eligible Co-operative Bank for the time being registered under the provisions of the Act as also an Insured Bank. Section 13-A, which was introduced by Act 56 of 1968 enabled an eligible Co-operative Bank to register itself as one of the insured banks and get the benefits of those Acts. However, as may be seen from the provisions and the definition of eligible co-operative bank, which we have extracted above, if a Co-operative bank is to get the benefit of insurance the law applicable to that bank shall contain a provision incorporating that portion which we have extracted above and also some other provisions which give certain powers to the Reserve Bank over the insured banks. In order to enable the Co-operative Banks which are registered under the Co-operative Societies Act of 1961 or deemed to have been registered under the Act, to come within the Act the Tamil Nadu legislature amended the said Act by inserting section 73-T in Act 37 of 1979. The relevant portions of section 73-T read as follows:

> 73-T. Order for winding-up, division. amalgamation, supersession of committee, etc. of insured co-operative bank not to be made without sanction or requisition of Reserve Bank of India:- Notwithstanding anything contained in this Act, in the case of an insured co-operative bank:-
>
> (i) an order of the winding-up or division or amalgamation or transfer of assets and liabilities of the bank or an order sanctioning a scheme of compromise or arrangment or reconstruction (including reorganisation) of the bank may be made only with the previous santion in writing of the Reserve Bank of India;
>
> (iii) an order for the winding-up of the bank shall be made by the Registrar if so required by the Reserve Bank of India in the circumstances

referred to in section 13-D of the Deposit Insurance and Credit Guarantee Corporation Act, 1961 (Central Act 47 of 1961);

(iii) if so required by the Reserve Bank of India in the public interest or for preventing the affairs of the bank being conducted in a manner detrimental to the interests of the depositors or for securing the proper management of the bank, an order shall be made by the Registrar for the supersession of the committee and the appointment of an administrator therefor for such period or periods, not exceeding five years in the aggregate, as may, from time to time be specified by the Reserve Bank of India, and the administrator so appointed shall, after the expiry of his term of office, continue in office until the day immediately preceding the date of the first meeting of the new committee;

(iv) No appeal, revision or review shall lie against an order referred to in clause (i), (ii) or (iii) made with the previous sanction in writing or on the requisition of the Reserve Bank of India and such order or sanction shall not be liable to be called in question in any manner. . ."

There were some minor further amendments by Tamil Nadu Act 67 of 1979 which need not detain us.

3. Before the amendment of the Act by insertion of section 73-T, the Registrar of Co-operative Societies had the power to supersede the committee under section 72, if in his opinion, the Society was not functioning properly or wilfully disobeys or wilfully fails to comply with any lawful order or direction issued by him. Under section 85 the Registrar was empowered, if he is of opinion after an enquiry had been held under section 65 or an inspection has been made under section 66 or section 67 or on receipt of application made by not less than 3/4th of the members of the registered society, that society ought to be wound up, to wind up the company. A reading of these two provisions in justaposition with that in section 73-T(i) and (ii) would show that in the case of an insured Co-operative Bank if a case has been made out for winding up under section 85 of the Act and the Registrar is of opinion that it ought to be wound up, he has to obtain the prior sanction of the Reserve Bank under Clause (i) before making such a winding-up order. But the real source of power is not in section 73-T but it is in section 86 and only an additional requirement of a previous sanction by the Reserve Bank is needed in the case of a winding-up taken under section 85. However, clause (ii) of section 73-T enables the Reserve Bank itself to require the Registrar to wind up the company in the circumstances referred to in section 13-D of the Deposit Insurance and Credit Guarantee Corporation Act, 1961. So, if the Reserve Bank wanted to take action, the conditions to be fulfilled for requiring the Registrar to wind up are thus found in section 13-D of Central Act 47 of 1961. But if the Registrar wants to wind up the Company on his own, he is to be satisfied about the conditions provided in section 85 of the Act. As already stated, if it was not an insured Co-operative Bank, if the Registrar is satisfied with the conditions specified in section 86 of the Act, he may wind up the Co-operative Bank, but in the case of insured Co-operative Bank an additional condition is to be satisfied, namely the prior sanction of the Reserve Bank has to be obtained. Similarly Clause (iii) of section 73-T of the Act also enables the Reserve Bank to require the Registrar to supersede the committee on being satisfied that it was necessary so to do in public interest or for preventing the affairs of the bank being conducted in a manner detrimental to the interests of the depositors or for securing the proper management of the bank. It may be that these conditions overlap those conditions mentioned in section 72. But the satisfaction about the existence of those conditions in order to invoke section 73-T of the Act is the satis-

faction of the Reserve Bank and not that of the Registrar, whereas section 72, refers to the satisfaction of the Registrar independently. While section 73-T made a distinction so far as winding up is concerned by fettering the Registrar to get the previous sanction of the Reserve Bank in case he wants to take action under section 85 it did not provide for any such fetter in the Registrar when he wants to take action under section 72. The section only reserves the power to the Reserve Bank itself to direct action to be taken for supersession of the committee and it did not fetter the powers of the Registrar for taking *suo motu* action under section 72 without reference to the Reserve Bank. The only fetter on the Registrar under section 72, if at all is that which is provided under section 72, (6) itself which requires that before taking any action under sub-section (1) of that section the Registrar shall consult the financing bank to which the society is indebted. Probably that was considered to be sufficient safeguard for retaining the power of the Registrar for superseding the Committee and not requiring the previous sanction of the Reserve Bank itself. Whatever be the reason, on a plain reading of these provisions we are of the view that the power of the Registrar under section 72 is not fettered in any way by the provisions of section 72-T (iii). The *non obstante* clause in the opening paragraph of the section only means that it reserved the powers of the Reserve Bank to direct the supersession notwithstanding anything contained in section 72 and it could not be taken to mean that the power of the Registrar under section 72 is taken away. We are, therefore, of the view that the notice issued by the Registrar in this case was well within his jurisdiction and it does not call for any interference.

4. The writ appeal accordingly fails and it is dismissed. But there will be no order as to costs.

R.S. ---- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *G.Ramanujam and G.Maheswaran, JJ.*

*W.A.Nos.529 and 575 of 1983.

20th November, 1984.

A.Arokia Doss and others *Appellants**

v.

L.T.Athmaram and others *Respondents.*

(A) Tamil Nadu Water Supply and Drainage Board Service Regulations (1972), Regulation 19(2)(b) - Whether violates Articles 14 to 16 of the Constitution of India.

(B) Constitution of India (1950), Articles 14 to 16.

According to Regulation 19(2)(b) and Regulation 23, of the Tamil Nadu Water Supply and Drainage Board Services Regulations both degree holders and diploma holders are entitled to be considered for promotion to posts of Executive Engineers. But so far as diploma holders are concerned they must be of exceptional merit and ability. Such a requirement cannot be said to be an educational qualification when the main part of the said Regulations proceeded on the basis that both degree--holders and diplomaholders are qualified to be considered for promotion. But so far as diploma holders are concerned, they must be of exceptional merit and ability. When the main part of the said Regulations proceeded on the basis that both degree holders and diploma holders are qualified to be considered for promotion as Executive Engineers, the proviso says that diploma holders cannot be promoted as Executive Engineers unless they are of exceptional merit and ability. Thus according to the said Regulations while degree holders can be promoted on the basis of merit and ability, seniority being equal, diploma holders can be promoted only if they had shown exceptional merit and ability. Apart from the fact that

there are no indications as to how exceptional merit and ability of a candidate could be gauged or assessed, the fact remains that after having considered them under the main part of the Regulations to be equals for the purpose of promotion, the proviso in so far as it imposes a further condition that the diploma holders should be of exceptional merit and ability makes them unequals. Regulation 19(2)(b) says that the post of Executive Engineers shall be a selection post and promotion to those posts shall be made on grounds of merits and ability, seniority being considered only if merit and ability are approximately equal. *[Para.8]*

The main part of the regulation treats all Assistant Executive Engineers whether degree holders or diploma holders as equals in the matter of promotion, the proviso however makes them unequal and such a classification is not with reference to any educational qualification. A degree in Engineering and a diploma in Engineering are both treated as sufficient qualification for the post of Executive Engineer. It is only with reference to merit a ditinction is made between degree holders and diploma holders; the degree holders have to merely exhibit merit and ability. The classification which is not based on educational qualification clearly offends Articles 14 and 16 since both the degree holders and diploma holders have been integrated into one service of Assistant Executive Engineers having a common seniority list and no distinction should be made except in the matter of educational qualification and here a distinction has been made which is clearly discriminatory. *[Para.8]*

Cases referred to:-

Roshan Lal v. Union of India, (1968)1 S.C.J.746: (1968)1 S.C.R.185: A.I.R.1967 S.C.1889; *State of Jammu and Kashmir v. Triloki Nath Koshla, (1974)1 S.C.* J.366: (1974)1 S.C.C.19: A.I.R.1974 S.C.1; *A.K.B.Nambiar v. The State of Kerala*, (1979) Lab.I.C.894; *State of Mysore v. Narasing Rao*, (1968)1 S.C.J. 863: (1968)1 S.C.R.407: A.I.R.1968 S.C.349; *Ganga Ram v. Union of India*, (1970)2 S.C.J.584: (1970)3 S.C.R.481: A.I.R.1970 S.C.2178; *Union of India v. Dr. (Mrs) S.B.Kohli*, (1973)3 S.C.C. 592: (1973) Lab.I.C.423: A.I.R.1973 S.C.811; *Mervyn v. Collector*, (1967)1 S.C.J.574: (1966)3 S.C.R.600: A.I.R.1967 S.C.52; *Mohd. Suhjat Ali v. Union of India*, (1975)1 S.C.R.449: A.I.R.1974 S.C.1631.

W.A.529/83:- Appeal under Clause 15 of the Letters Patent against the order of Mr.Justice Mohan dated 10-3-1983 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No.1896 of 1981 presented under Article 226 of the Constitution of India, to issue a writ of declaration, declaring the proviso 2 to Rule 19(2)(b) of the Tamil Nadu Water Supply and Drainage Board, Service Regulation 1972 as *ultra vires* and un-constitutional in so far as the petitioner is concerned.

W.A.575/83:- Appeal under Clase 15 of the Letters Patent against the Order of Mr.Justice Padmanabhan, dated 29-1-1983, and made in the exercise of the Special Original Jursidction of the High Court in W.P.No.1794/81 presented to the High Court, under Article 226 of the Constitution of India, praying for issue of a writ of mandamus, forbearing the respondents from making any promotion to the post of Executive Engineer in the Tamil Nadu Water Supply and Drainage Board, Engineering Service without considering the claim of the petitioner.

S.Sundar for Aiyar and Dolia, for Appellant.

V.Ramajagadeesan, for Respondents in W.A.No.529/83.

C.Chinnaswami, for Appellant in W.A.No. 575/83 and for Respondents 2 to 4 in W.A.No.529/83.

The Judgment of the Court was delivered by

Ramanujam, J.:- These two appeals have been filed against the judgments rendered by Padmanabhan, J. in Writ Petition No.1794/81 and Mohan, J. in W.P.1896/81. The first writ appeal viz. W.A.No.529/83 has been filed by respondents 4 to 7 in the Writ Petition No.1896/81 and the second writ appeal viz. W.A.No.-575/83 has been filed by the 2nd respondent in the writ petition 1794 of 1981.

2. The circumstances under which the above writ petitions came to be filed before this court agaisnt respondents 1 and 2 therein representing the Tamil Nadu Water Supply and Drainage Board, hereinafter referred to as the "Board" for the issue of a writ of declaration declaring proviso 2 to Rule 19(2)(b) of the Tamil Nadu Water Supply and Drainage Board Service Rules as *ultra vires* and unconstitutional in so far as the petitioners are concerned are these: They possess Diploma and Licentiate in Sanitary Engineering and Civil Engineering of the Directorate of Technical Education, Madras. There are two feeder categories from which promotion is made to the post of Assistant Executive Engineers. One is the category of Assistant Engineers who are degree holders whereas junior engineers are diploma holders. The petitioners belonged to the latter category. Once the persons are promoted as Assistant Executive Engineers from the above two feeder categories, they got merged into one category namely, Assistant Executive Engineers. The responsibilities and the nature of work as also the emoluments are the same and there is no differentiation thereafter. After the petitioners were promoted as Assistant Executive Engineers, a common seniority list was published on 24-4-1980. In that list, the writ petitioners were sufficiently seniors to be considered for promotion as Executive Engineers. However, since the petitioners were not promoted as Executive Engineers even though their juniors have been promoted, they made representations to the Board to the effect that they had to be promoted before their juniors are promoted but they were told that they could be considered for promotion only if they are of exceptional merit and ability as provided in the proviso to Regulation 19(2)(b) of the Board's Service Regulations, 1972. It is at this stage the petitioners have come before this court, seeking a declaration that the proviso to Regulation 19(2)(b) is invalid and for directing the respondents in the writ petitions to promote the petitioners ignoring the above alleged invalid provision in the Regulations.

3. In the counter affidavit filed by the Board in both the writ petitions, it has been averred that the promotions to the post of Executive Engineers are governed by Regulation 19(2) and Regulation 23 of the Board's Service Regulations and since the petitioners are diploma holders they cannot be promoted unless they are of exceptional merit and ability and the Board after considering the petitioners' cases did not find them to be of persons of exceptional merit and ability and as such they were not promoted, that such a provision requiring diploma holders to be of exceptional merit and ability so as to enable them, to give promotions has not been introduced for the first time but has been in existence in the Public Health Engineering and Municipal Engineering Service from which the petitioners originally came and the Board's Regulations merely continue the same. According to the Board, Regulation No.19(2)(b) does not violate either Article 14 or Article 16 of the Constitution as contended by the writ petitioners. It is also pointed out by the Board that Regulation 23 prescribes the qualification and so long as the Board has got the power to prescribe the qualifications for the posts of Executive Engineers, neither Regulation 23 nor the proviso to Regulation 19(2)(b) could be successfully questioned.

4. Padmanabhan, J. before whom Writ Petition No.1794/81 came up for disposal held that though the petitioner herein

was a diploma holder, once degree holders and diploma holders are appointed as Assistant Executive Engineers and treated alike both in respect of their duties as well as salary, no discrimination could be made between the two categories with reference to the subsequent promotion to the post of Executive Engineers and that since the proviso to Regulation 19(2)(b) discriminates the Assistant Executive Engineers who are diploma holders it has to be struck down. In that view the learned Judge allowed the writ petition and directed the Board to consider the claim of the petitioner in that writ petition for promotion as Executive Engineer on a par with others without reference to the second proviso to Regulation 19(2)(b). Writ Petition No.1896 of 1981 came up for final disposal before Mohan, J. and the learned Judge has followed and applied the said decision of Padmanabhan, J. rendered in Writ Petition No.1794/81. Thus the view taken by Padmanabhan, J. has been questioned in these writ appeals by the Board on the one hand and persons who are likely to be affected by giving effect to the order of Padmanabhan, J. on the other.

5. To appreciate the contentions advanced by both sides, it is necessary to have an idea of the relevant Regulations. Section 73 of the Tamil Nadu Water Supply and Drainage Board Act, hereinafter referred to as the Act, 1970 enables the Board to make Regulations with the previous approval of the State Government. In exercise of the power under section 73 the Board has made the Tamil Nadu Water Supply and Drainage Board Service Regulations, 1972, hereinafter referred to as the Service Regulations with effect from 14-4-1971. Regulation 5 constitutes five different services Tamil Nadu Water Supply and Drainage Board (1) General Service, (2) Engineering Service, (3) Engineering Subordinate Service, (4) Subordinate Service and (5) Last Grade Service. We are concerned here with the Engineering Service and this consists of the following 9 categories viz. (1) Chief Engineer, (2) Superintending Engineers, (3) Executive Engineers (including Deputy Engineers), (4) Assistant Water Analyst (8) Assistant Geologist and (9) Geological Assistant. Regulation 9(4) deals with the promotion to the post of Executive Engineers and Superintending Engineers. It provides that the Chief Engineer of the Board shall prepare a list of all eligible candidates arranged in the order of seniority for consideration having regard to their efficiency-cum-seniority showing in the list their names, present designation, present pay, age, qualifications and experience and forward the same to the Managing Director with their confidential reports, and the Managing Director after scrutinising the list and the confidential reports will make his recommendations to the Board for selection, and after selection by the Board, the Managing Director will issue necessary orders. Regulation 19(2) deals with the appointment to the various categories in the Board's Engineering Service. Promotion to the posts of Executive Engineers is from Assistant Engineers and promotion to the posts of Assistant Engineers is either by direct recruitment or by promotion from Junior Engineers or Supervisors. Regulation 19(2)(b) says that the posts of Chief Engineer, Superintending Engineers and Executive Engineers shall be selection posts and promotions to these posts shall be made on grounds of merit and ability, seniority being considered only where merit and ability are approximately equal. However, there is a proviso to Regulation 19(2)(b) which is to the following effect:-

> "Provided that an Assistant Engineer possessing the Upper Subordinate or Licentiate in Civil Engineering Diploma of the College of Engineering, Guindy or of State Board of Technical Education and Training, Madras, should not be eligible for promotion to the post of Executive Engineer unless he has shown exceptional merit in his work."

It is the scope of the above proviso to Regulation 19(2)(b) which has now come up for consideration. Regulation

23 prescribes the requisite qualifications for various categories of persons in the Board's Service. The qualifications set out therein for the post of Executive Engineer are as follows:-

(i) Must be an approved probationer in the service as Assistant Engineer;

(ii) Must have rendered service as Assistant Engineer for not less than -

(a) five years if recruited by transfer; or
(b) six years if recruited direct; and
(iii) Must possess a degree in Engineering (Civil or Mechanical) of any University or Institution recognized by the University Grants Commission for the purpose of its grant; or

A diploma in Civil or Mechanical Engineering of the College of Engineering, Guindy or Licentiate in Civil Engineering, Licentiate in Sanitary Engineering or Diploma in Civil Engineering of the State Board of Technical Education and Training, Madras.

Provided in the case of Diploma holders those with exceptional merit and ability alone shall be considered for promotion."

It is in the light of these Regulations, the rival contentions of the parties in this case have to be considered. According to the writ petitioners, though it is true that the petitioners as diploma holders were originally appointed as Junior Engineers, and were later promoted as Assistant Executive Engineers, while degree holders were directly recruited as Assistant Engineers and then later on promoted as Assistant Executive Engineers, once they are appointed as Assistant Executive Engineers and integrated into one category, no further distinction could be made as between degree holders and diploma holders in the matter of further promotion and any discrimination at that stage based on the educational qualifications will clearly offend Articles 14 and 16 of the Constitution. According to them as Assistant Executive Engineers, both the degree holders as well as diploma holders discharge the same functions and receive the same salary and there is absolutely no distinction between them. Therefore, for purposes of promotion there could not be any differentiation between the degree holders and diploma holders taking into account the source from which their promotion was made. In support of their contention, the writ petitioners have strongly relied on the decision of the Supreme Court in *ROSHAN LAL v. UNION OF INDIA*, (1968)1 S.C.J.746= (1968)1 S.C.R.185= A.I.R.967 S.C.1889 and state that the decision of Padmanabhan, J. is quite in accord with the view expressed by the Supreme Court in the said case.

6. On the other hand, on behalf of the appellants it is contended that for purposes of promotion the educational qualification is the relevant criterion and that even from among the members of the same service, promotion could be made taking into account the educational qualifications possessed by them and that it cannot be said in all cases that once people from various sources are brought under one category no distinction could be made between degree holders and diploma holders. It is further contended on behalf of the appellants, that similar rules for promotion to the posts of Executive Engineers were in existence even before the framing of the Regulations and that, therefore, the Regulations do not make any departure in the position that existed before the framing of the Regulations and hence the writ petitioners cannot have any tenable grievance against the impugned Regulations. In support of their contentions, reference has been made to the decision in *STATE OF JAMMU AND KASHMIR v. TRILOKI NATH KOSHLA AND OTHERS*, (1974)1 S.C.J. 366= (1974)1 S.C.C.19= A.I.R.1974 S.C.1 and *A.K.B.NAMBIAR v. STATE OF KERALA*, (1979) Lab.I.C.894.

7. The question of classification on the basis of educational qualifications came to be considered by the Supreme Court in *STATE OF MYSORE v. NARASING*

RAO, (1968)1 S.C.R.407: (1968)1 S.C.J. 863= A.I.R.1968 S.C.349; *GANGA RAM v. UNION OF INDIA*, (1970)3 S.C.R.481: (1970)2 S.C.J.584= A.I.R.1970 S.C.2178; *THE UNION OF INDIA v. DR (MRS) S.B.KOHLI*, (1973)2 S.C.C.592= (1973) Lab.I.C.423= A.I.R.1973 S.C.811 and in all those cases the classification was upheld. In *STATE OF MYSORE v. NARASING RAO*, (1968)1 S.C.R.407: (1968)1 S.C.J.863= A.I.R.1968 S.C.349 the tracers doing equal work were classified into two grades having unequal pay, the basis of the classification being higher educational qualifications. In *GANGA RAM'S CASE*, (1970)3 S.C.R.481: (1970)2 S.C.J.584 the court held that it is open to the State to lay down conditions of efficiency and other qualifications for securing best services for being eligible for promotion in its departments. In *KOHLI'S CASE*, (1973)3 S.C.C.592= (1973) Lab.I.C.423= A.I.R.1973 S.C.811 the rule requiring that a Professor in Orthopaedics must have a post-graduate degree in the particular speciality was upheld on the ground that the classification made on the basis of such a requirement was not without reference to the objectives sought to be achieved and there can be no question of discrimination. In that case the argument that a degree qualification was not the only criterion of suitability was rejected as strange. Then came the decision in *STATE OF JAMMU AND KASHMIR v. TRILOKI NATH KHOSLA AND OTHERS*, (1974)1 S.C.J.366= A.I.R.1974 S.C.1 wherein the Supreme Court affirmed the view taken in the above three cases and held that a classification made on the basis of educational qualification was valid. In that case the Jammu and Kashmir Engineering (Gazetted) Service Recruitment Rules, 1970 classified Assistant Engineers on the basis of educational qualifications for purpose of promotion as Executive Engineers. The question arose whether such a classification was violative of Articles 14 and 16 of the Constitution. The rules provided that only those Assistant Engineers who possessed a degree in Engineering shall be eligible for promotion as Executive Engineer thus rendering the diploma holders in engineering who are working as Assistant Engineers ineligible for promotion as Executive Engineers. The High Court took the view that the impugned rule restricting the promotion only to those Assistant Engineers who are diploma holders was violative of Articles 14 and 16 of the Constitution and when the matter went before the Supreme Court, it was contended on behalf of the State that the employees can, in the matter of promotion, be classified into different classes of promotion, be classified into different classes on the basis of any intelligible differentia as for example, educational qualifications which has a nexus with the object of the classification, namely, officiency in the post of promotion. The said contention was upheld by the Supreme Court. According to the Supreme Court though the persons appointed directly or by promotion were integrated into a common class of Assistant Engineers, they could, for purposes of promotion to the cadre of Executive Engineers be classified on the basis of educational qualifications, and that the rule providing that graduates shll be eligible for such promotion to the exclusion of diploma holders did not violate Articles 14 and 16 of the Constitution, and that as such a classification is made with a view to achieve administrative efficiency in the engineering service, the classification is clearly correlated, to it, for, higher educational qualifications are at least presumptive evidence of a higher mental equipment and the courts have always recognised educational qualifications as a safe criteria for determining the validity of a classification. The above decision clearly lays down that fixation of an educational qualification for purpose of promotion even if it is likely to affect some of the persons in the feeder category who do not have that educational qualification will have to be held to be valid for the educational qualification is a relevant criterion for making a classification with a view to secure efficiency of service.

8. In *ROSHAN LAL v. UNION OF INDIA*, (1968)1 S.C.R.185= (1968)1 S.C.J.746=

A.I.R.1967 S.C.1889 the Supreme Court considered a question which is similar to the one arising here. In that case the Railway Board issued a notification providing that 80% of the vacancies in Grade C would be filled up from the class of apprentice trainee examiners recruited on and after April 1, 1966 and the remaining 20% from amongst the train examiners in Grade D. It also provided that the apprentice trainee examiners who are absorbed in Grade D before April 1, 1966 would be accommodated in Grade C in the 80% of the vacancies reserved for them without undergoing any selection. Roshan lal Tandao who was a skilled artisan who was later selected and confirmed in Grade D as a train examiner challenged the said notification in so far as the notification gave a favourable treatment in regard to apprentice train examiners who had already been absorbed in Grade D. His case was that he along with other direct recruits formed one class in Grade D and according to the conditions of service applicable to them seniority was to be reckoned from the date of appointment as train examiners Grade D and promotion to Grade C was to be on the basis of the seniority cum suitability, irrespective of the source of recruitment and so long as he has been integrated with others in Grade D who came by direct recruitment no differentiation could be made as between him and the direct recruits in the matter of promotion to Grade C. The said Constitutional objection was upheld by the Supreme Court with these observations:

> "At the time when the petitioner and the direct recruits were appointed to Grade D there was one class in Grade D formed of direct recruits and the promotees from the grade of artisans. The recruits from both the sources to Grade D were integrated into one class and no discrimination could thereafter be made in favour of recruits from one source as against the recruits from the other source in the matter of promotion to Grade C. To put differently, once the direct recruits and promotees are absorbed in one cadre, they form one class and they cannot be discriminated for the purpose of further promotion to the higher grade C. In the present case, it is not disputed on behalf of the first respondent that before the impugned notification was issued there was only one rule of promotion for both the departmental promotees and the direct recruits and that rule was seniority-cum-suitability, and there was no rule of promotion separately made for application to the direct recruits. As a consequence of the impugned notification a discriminatory treatment is made in favour of the existing Apprentice Train Examiners who have already been absorbed in Grade D by March 31, 1966, because the notification provides that this group of Apprentice Train Examiners should first be accommodated en bloc in grade C upto 80 per cent of vacancies reserved for them without undergoing any selection. As regards the 20 per cent of the vacancies made available for the category of Train Examiners to which the petitioner belongs the basis of recruitment was selection on merit and the previous test of seniority-cum-suitability was abandoned. In our opinion, the present case falls within the principle of the recent decision of this court in *Mervyn v. Collector*, (1966)3 S.C.R.600= (1967)1 S.C.J.574= A.I.R. 1967 S.C.52.

From the above observations it will be clear that in the matter of promotional opportunities to Grade C no discrimination could be made between promotees and direct recruits by reference to the source from which they were drawn, and no favourite treatment could be given to the direct recruits in Grade D as against promotees to Grade D. Thus *Roshan Lal's Case*, (1968)1 S.C.J.746: (1968)1 S.C.R.185 lays down that direct recruits and promoties lost their birthmarks on fution into a common stream of service and they cannot therefore be treated differently by reference to the consideration that they were recruited from different sources and that once they are integrated into

common class to make them equals, by making a classification cannot make them unequal again. The view taken in *Roshna Lal's Case*, (1968)1 S.C.J.746 has been reiterated in *MOHD SHUJAR ALI v. UNION OF INDIA*, (1975)1 S.C.R.449= A.I.R.1974 S.C.1631. In that case the Supreme Court after considering its earlier decisions observed:

> "Now, there are three decisions of this court where educational qualifications have been recognised as forming a valid basis for classification. In *State of Mysore v. Narasing Rao*, (1968)1 S.C.J.863= (1968)1 S.C.R.407= A.I.R.1968 S.C.349= (1968) Lab.I.C.360 this court held that higher educational qualifications such as success in SSLC examination are relevant considerations for fixation of higher pay scale for tracers who have passed the SSLC examination and the classification of two grades of tracers in Mysore State one for matriculate tracers with higher pay scale and the other for non-matriculate tracers with lower pay scale, cannot be said to be violative of Article 14 or 16. So also in *Union of India v. Dr. (Mrs) S.B.Kohli*, (1974)2 S.C.J.250= (1973)3 S.C.R.117= (1973)3 S.C.C.592= A.I.R.1973 S.C.811= (1973) Lab.I.C.423 a Central Health Service Rule requiring that a Professor in Orthopaedics must have a post graduate degree in particular speciality was upheld on the ground that the classification made on the basis of such a requirement was not 'without reference to the objectives sought to be achieved and there can be no question of discrimination." A very similar question arose in *Triloki Nath Kasha's Case*, (1974)1 S.C.J.366= (1974)1 S.C.C.19= A.I.R.1974 S.C.1= (1974) Lab.I.C.1 where a rule which provided that only degree holders in the cadre of Assistant Engineers shall be entitled to be considered for promotion in the next higher cadre of Executive Engineers and diploma holders shall not be eligible for such promotion was challenged as violative of the equal opportunity clause. The Court repelled the challenge holding that 'though persons appointed directly and by promotion were integrated into a common class of Assistant Engineers, they could, for the purposes of promotion to the cadre of Executive Engineers, be classified on the basis of educational qualifications' and 'the rule providing that graduates shall be eligible for such promotion to the exclusion of diploma holders' was not obnoxious to the fundamental guarantee of equality and equal opportunity. But from these decisions it cannot be laid down as an invariable rule that whenever any classification is made on the basis of variant educational qualifications, such classification must be held to be valid, irrespective of the nature and purpose of the classification or the quality and extent of the differences in the educational qualifications. It must be remembered that 'life has relations not capable always of division into inflexible compartments' The moulds expand and shrink. The test of reasonable classification has to be applied in each case on its peculiar facts and circumstances. It may be perfectly legitimate for the administration to say that having regard to the nature of the functions and duties attached to the post, for the purpose of achieving efficiency in public service, only degree holders in engineering shall be eligible for promotion and not diploma or certificate holders. That is what happened in *Triloki Nath Kosha's Case*, (1974)1 S.C.J.366= (1974)1 S.C.C.19= A.I.R. 1974 S.C.1= (1974) Lab.I.C.1 and a somewhat similar position also obtained in *S.B.Kohli's Case*, (1974)2 S.C.J.250= (1973)3 S.C.R.117= (1973)3 S.C.C.592= A.I.R.1973 S.C.811: (1973)1 Lab.I.C.423. But where graduates and non-graduates are both regarded as fit and, therefore eligible for promotion, it is difficult to see now, consistently with the claim for equal opportunity, any differentiation can be made between them by laying down a quota of promotion for each and giving preferential treatment to graduates over non-graduates in the matter of fixation of such quota.

The result of fixation of quota of promotion for each of the two categories of Supervisors would be that when a vacancy arises in the post of Assistant Engineer, which, according to the quota is reserved for graduate Supervisors, a non-graduate Supervisor cannot be promoted to that vacancy, even if he is senior to all other graduate Supervisors and more suitable than they. His opportunity for promotion would be limited only to vacancies available for non-graduate Supervisors. That would clearly amount to denial of equal opportunity to him. When there is a vacancy ear-marked for graduate Supervisor, a non-graduate Supervisor would be entitled to ask: 'I am senior to the graduate Supervisor who is intended to be promoted. I am more suitable than he is. It is no doubt true that I am a non-graduate, but my not being a graduate has not been branded as a disqualification. I am regarded fit for promotion and, like the graduate Supervisor, I am equally eligible for being promoted. My technical equipment supplemented by experience is considered adequate for discharging the functions of Assistant Engineer. Then why I am being denied the opportunity for promotion and the graduate Supervisor is preferred?' There can be no satisfactory answer to this question. It must be remembered that many of these non-graduate Supervisors might not have been able to obtain degree in engineering becasue they came from poorer families and did not have the financial resources to pursue degree course in engineering and not because they lacked the necessary capacity and intelligence. 'Chilly penury' might have 'repressed their noble rage'. It is of the essence of equal opportunity for such persons with humble and depressing backgrounds that they should have opportunity, through experience or self-study, to level up with their more fortunate colleagues who, by reason of favourable circumstances, could obtain the benefit of higher education, and if they prove themselves fit and more suitable than others, why should they be denied an opportunity to be promoted in a vacancy on the ground that that vacancy belongs to Supervisors possessing higher educational qualifications. As pointed out by Krishna Iyer, J. in *Triloki Nath Kasha's Case*, (1974)1 S.C.J.366= (1974)1 S.C.C.19= A.I.R. 1974 S.C.1= (1974) Lab.I.C.1 'the soul of Article 16 is the promotion of the common man's capabilities, over-powering environmental adversities and opening up full opportunities to develop in official life without succumbing to the sophistic argument of the elite that talent is the privilege of the few and they must rule'. To permit discrimination based on educational attainments not obligated by the nature of the duties of the higher post is to stifle the social thrust of the equality clause. A rule of promotion which, while conceding that non-graduate Supervisors are also fit to be promoted as Assistant Engineers, reserves a higher quota of vacancies for promotion for graduate Supervisors as against non-graduate Supervisors would clearly be calculated to destroy the guarantee of equal opportunity. But even so, we do not think we can be persuaded to strike down the Andhra Pradesh Rules in so far as they make differentiation between graduate and non-graduate Supervisors. This differentiation is not something brought about for the first time by the Andhra Pradesh Rules. It has always been there in the Engineering Services of the Hyderabad and the Andhra Pradesh States. The graduate Supervisors have always been treated as a distinct and separate class from non-graduate Supervisors both under the Hyderabad Rules as well as the Andhra Rules and they have never been integrated into one class. Under the Hyderabad Rules, the pay scale of graduate Supervisors was Rs.176-300, while that of non-graduate Supervisors was Rs.140-300, and similarly under the Andhra Rules the pay scale of non-graduate Supervisors was Rs.100-250, but graduate Supervisors were started in this pay scale at

the rate of Rs.150/- so that their pay was Rs.150-250. Graduate Supervisors and non-graduate Supervisors were also treated differently for the purpose of promotion under both sets of Rules. In fact, under the Andhra Rules a different nomenclature of Junior Engineers was given to graduate Supervisors. The same differentiation into two classes also persisted in the reorganised State of Andhra Pradesh. The pay scale of Junior Engineers was always different from that of non-graduate Supervisors and for the purpose of promotion, the two categories of Supervisors were kept distinct and apart under the Andhra Rules even after the appointed day. The common gradation list of Supervisors finally approved by the Government of India also consisted of two parts, one part relating to Junior Engineers and the other part relating to non-graduate Supervisors. The two categories of Supervisors were thus never fused into one class and no question of unconstitutional discrimination could arise by reason of differential treatment being given to them. Contention E cannot, therefore, prevail and must be rejected."

We are of the view that the facts of this case attract the decisions of the Supreme Court in *ROSHANLAL'S CASE*, (1968)1 S.C.R.185= (1968)1 S.C.J.746= (1975)1 S.C.R.449= A.I.R.1974 S.C.1631. The other judgments of the Supreme Court which have been relied on by the learned counsel for the appellants merely related to fixation of an educational qualification for the promotional post, and that was challenged on the ground that it is likely to result in a classification of two categories, one having a higher educational qualification and the other having a lower educational qualification. That contention was rejected and the fixation of educational qualification was upheld on the ground that it had a nexus with the object sought to be achieved and that educational qualification is always a relevant criterion for making a classification. But that principle will not apply to the facts of this case where there is no fixation of an educational qualification as such. Here according to Regulation 19(2)(b) and Regulation 23 both degree holders and diploma holders are entitled to be considered for promotion. But so far as diploma holders are concerned, they must be of exceptional merit and ability. Such a requirement cannot be said to be an educational qualification. When the main part of the said Regulations proceed on the basis that both degree holders and diploma holders are qualified to be considered for promotion as Executive Engineers, the proviso says that diploma holders cannot be promoted as Executive Engineers unless they are of exceptional merit and ability. Thus according to the said Regulations while degree holders can be promoted on the basis of merit and ability seniority being equal, diploma holders can be promoted only if they had shown exceptional merit and ability. Apart from the fact that there are no indications as to how exceptional merit and ability of a candidate could be gauged or assessed, the fact remains that after having considered them under the main part of the Regulations to be equals for the purpose of promotion, the proviso in so far as it imposes a further condition that the diploma holders should be of exceptional merit and ability makes them unequals. As already stated Regulation 19(2)(b) says that the posts of Executive Engineers shall be selection posts and promotion to those posts shall be made on grounds of merit and ability, seniority being considered only if merit and ability are approximately equal. Regulation 23 says that for a person to be promoted as an Executive Engineer, he must have the following qualifications:

(i) Must be an approved probationer in the service as Assistant Engineer;
(ii) Must have rendered service as Assistant Engineer for not less than
(a) five years if recruited by transfor; or
(b) six years if recruited direct; and
(iii) Must possess a degree in Engineering (Civil and Mechanical) of any University or Institution recognised

by the University Grants Commission for the purpose of its grant; or

A diploma in Civil or Mechanical Engineering of the College of Engineering, Licentiate in Sanitary Engineering or Diploma in Civil Engineering of the State Board of Technical Education and Training, Madras.

Provided in the case of Diploma holders those with exceptional merit and ability alone shall be considered for promotion."

Thus a diploma in civil engineering is also treated as a sufficient qualification for promotion as Executive Engineer. Thus the main part of the Regulation 23 treats degree holders as well as diploma holders alike in the matter of promotion. However, the proviso to Regulation 23 says that in the case of diploma holders those with exceptional merit and ability alone shall be considered for promotion. In this connection, a reference to Regulation 9(4) will be apposite. That rule says that for purposes of promotion to the posts of Executive Engineers, a list of all eligible candidates arranged in the order of seniority having regard to their efficiency-cum-seniority showing the names of persons, present designation, present pay, age, qualifications and experience shall be prepared and forwarded for the approval of the Board. Thus this provision shows that once the degree holders who are Assistant Engineers and diploma holders who are Junior Engineers were recruited as Assistant Executive Engineers, the former by direct recruitment and the latter by promotion, they are integrated into one service having a common seniority list prepared for purposes of further promotion as Executive Engineers. As already stated, the main Regulation 19(2)(b) and Regulation 23 having treated all assistant Executive Engineers whether they are diploma holders or degree holders alike and having given them the chance for promotion by assuring them that there will be a selection to the posts of Executive Engineers, having regard to merit and ability, the diploma holders alone cannot be segregated and a further condition imposed on them that they should possess exceptional merit and ability for the purpose of getting promotion as Executive Engineers. Thus the main part of the regulation treats all Assistant Executive Engineers whether they are degree holders or diploma holders as equals in the matter of promotion, the proviso makes them unequal and such a classification is not with reference to any educational qualification. As already stated, a degree in Engineering and a diploma in Engineering are both treated as sufficient qualification for the post of Executive Engineer. It is only with reference to merit a distinction is made between degree holders and diploma holders; the degree holders have to merely exhibit merit and ability while the diploma holders have to exhibit exceptional merit and ability. This classification which is not based on educational qualification clearly offends Articles 14 and 16 for both the degree holders and diploma holders have been integrated into one service of Assistant Executive Engineers having a common seniority list and no distinction should be made except in the matter of educational qualification and here the distinction has been made which is clearly discriminatory.

In this view of the matter, we are inclined to agree with the view taken by Padmanabhan, J. The writ appeals therefore fail and are dismissed. There will, however, be no order as to costs.

R.S. ----- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *S.Mohan and T.Sathiadev, JJ.*

*W.A.No.44 of 1981 against W.P.No.4186 of 1977. 12*th March*, 1984.

The Managing Director, The Food Corporation of India, 16-20, Barakhamba Lane, New Delhi. 110 001 *Appellant**

v.

O.M.Natarajan and others *Respondents.*

(A) Central Civil Services (Pension) Rules (1972), Rule 9 and Food Corporation of India (Staff) Regulations, Regulations 31 and 32 and Food Corporation Act (XXXVII of 1964), section 12-A (4)(b) - Scope and applicability.

(B) Constitution of India (1950), Article 226.

The first respondent originally an employee of the Government of India in the Food Department became the Deputy Manager of the Food Corporation of India. He retired from service on superannuation on 11th May, 1975. Just prior to his retirement, a memorandum of charges dated 2nd December, 1974, was issued to him stating that while he was functioning as Senior Assistant Manager he had put up false and misleading notes and caused seven road movement orders to be passed by the Deputy Zonal Manager resulting in loss to the Corporation and the Government of India, and that by this, he had contravened Regulation 31 and 32 of the Food Corporation of India (Staff) Regulations. After a series of correspondence the Food Corporation wrote to the first respondent calling upon him to participate in the enquiry to be held against him. Thereupon the first respondent filed a writ petition to quash a memo calling upon him to participate in the enquiry. The writ petition was allowed. The learned Judge held that the opting by the employee to be governed by the Central Government Pension Rules would relate only to benefits and would not extend to disadvantages like continuance of disciplinary proceedings beyond retirement, etc. On appeal, by the Food Corporation,

Held:- A careful reading of section 12-A (4)(b) of the Food Corporation Act clearly shows that it is open to an employee of the Food Corporation to exercise his option with reference to the following (1) Leave (2) Provident fund (3) retirement and (4) other terminal benefits. Thereafter it is not open to him to say because it is disadvantageous to him he revokes his option. It was in this background the first respondent exercised his option. A careful reading of this section merely shows that the option decides the benefits which have been catelogued will be available to the person opting in accordance with the rules and orders of the Central Government as amended from time to time. These benefits are found in Chapter V, rules 35 to 41 of the Central Services Pension Rules. If there is any amendment to these rules, these amendments will undoubtedly apply to such person. *[Para.5]*

Inasmuch as neither section 12-A (4)(b) nor the option exercised by the first respondent on 1-3-1974 has anywhere stated *pro tanto* the Pension Rules will apply, it is impossible for the Corporation to rely upon rule 9. This is because, inasmuch as the Food Corporation of India State Regulations do not provide for continuance of a disciplinary proceedings after the retirement of an employee, to confer such a power as claimed under rule 9 of the Pension Rules, there must be an express statement. This cannot arise by way of implication because such an implication is not even stated anywhere either in the Food Corporation of India Act or under the Staff Regulations or even in the option. This will be reading something into the Staff Regulations for which no express provision was ever made. Of course, if section 12-A (4)(b) had stated that once an option is exercised, all the rules '*mutatis mutandis*' would apply to the Corporation employees, then perhaps there is some-

thing to be said in favour of the Corporation. But no such thing arises in this case. Besides the first respondent who was originally serving in the Food Department became an employee of the Corporation. Therefore, in so far as rule 9 contemplates enquiry against a Government servant unless there is a specific reference of such rule being made applicable to the employees of the Corporation, it is impossible to confer such a power on the Corporation. *[Para.5]*

Appeal under Clause 15 of the Letters Patent against the Order of Mr. Justice Padmanabhan, dated 22-7-1980 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No.4186 of 1977 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records relating to charge Memo. No.IV/10-/74. Vigilance dated 2-12-1974 issued by the 1st respondent/appellant herein and quash the same.

S.Ramalingam, for Appellant.

G.Ramaswamy for M.Ganapathy and R.Mahesh, for Respondent No.1

O.R.Abdul Kalam, Additional Central Government Standing Counsel, for Respondents 3 and 4.

The Judgment of the Court was delivered by

Mohan, J.:- The short facts loading to the writ appeal filed by the Food Corporation of India are as follows. The 1st respondent before us was the Deputy Manager of the Food Corporation of India (hereinafter called the Corporation). He was originally an employee of the Government of India in the Food Department. After the enactment of the Food Corporation of India Act, the employees who were working in the Food Department of the Government of India were transferred to the Corporation. Accordingly, the 1st respondent was also transferred to the Corporation. On 16-5-1974 he was posted as the Deputy Manager (Shipping) in the Office of the Joint Manager (PO) of the Corporation. He retired from service on superannuation on 11th May, 1975.

2. Just prior to the retirement of the 1st respondent, a memorandum of charge dated 2nd December, 1974 was issued to the 1st respondent by the Managing Director of the Corporation. The said memo stated that while the 1st respondent was functioning as Senior Assistant Manager had put up false and misleading notes and caused seven road movement orders to be passed by the Deputy Zonal Manager resulting in loss to the Corporation and the Government of India. By this, he had contravened Regulations 31 and 32 of the Food Corporation of India (Staff) Regulations. The memo further stated that it was proposed to hold an enquiry against him as provided for under Regulation 58. It was only after this the 1st respondent was retired on 11-5-1975 as aforesaid. On 5th July, 1975, a memorandum was issued to the 1st respondent informing him that one J.S.Arora, Senior Regional Manager of the Corporation and one A.Viswanathan, Inspector, Special Police Establishment to present the case of the Corporation against the 1st respondent before the Inquiring Authority. The 1st respondent thereupon on 24-7-1975 wrote a letter objecting to the conduct of the enquiry on the ground that inasmuch as he had retired from the service of the Corporation by superannuation, he ceased to be an employee of the Corporation and consequently no enquiry could be held against him. The first respondent further sent various letters to the appellant objecting to the proposed enquiry. Finally, a memo dated 9th September, 1977 was received from the Corporation stating that as the 1st respondent had not made any valid ground for dropping the enquiry, he was called upon to participate in the enquiry. It was in those circumstances the 1st respondent filed a writ petition for the issue of *certiorari* to quash the memo dated 2nd December, 1974, issued by the appellant.

It was contended on behalf of the Corporation that the 1st respondent having exercised the option to be governed by the pension rules with regard to (1) Leave (2) Provident Fund (3) Retirement and (4) other terminal benefits in accordance with the rules and orders of the Central Government, as amended from time to time, he is liable to be proceeded against under Rule 9 of the Central Civil Service (Pension) Rules, 1972. The learned single Judge, Padmanabhan, J. was of the view that by this option it only meant the benefits available to the employees of the Corporation and not the disadvantages, like the continuance of the disciplinary proceedings beyond retirement. The further ground which prevailed with the learned single Judge was it was not the President of India who had taken the action. Lastly it was held that inasmuch as the first respondent had been allowed to retire on 11-5-1975 without any reservation for continuing the enquiry against him, the order could not be supported. For all these reasons, he made the rule absolute and allowed the writ petition. It is against this, the present appeal has been preferred by the Managing Director of the Corporation.

3. It is urged by Mr.S.Ramalingam, learned counsel for the appellant that the learned single Judge had erred in construing the option given by the 1st respondent on 1-3-1974, inasmuch as the 1st respondent had understood the scope of the option because he clearly states 'having understood the comparative advantages and disadvantages of the leave, provident fund, retirement and other terminal benefits, admissible to the employees under the Central Government and the F.C.I. . .' Therefore, where he clearly understood the disadvantages as well, he cannot say that Rule 9 of the Cental Civil Services (Pension) Rules, will not apply. That rule clearly clothes the authority concerned to continue the disciplinary proceedings albeit the retirement of an employee. The question of the President of India taking action does not arise at this stage. That will arise only after the completion of the enquiry which stage has not yet reached. Lastly it is submitted that merely because the 1st respondent was allowed to retire on 11-5-1975 that does not mean the enquiry against him under the Pension Rules is liable to be terminated. It is not that the Corporation is taking action for dismissal, removal or reduction in etc. but only taking action with regard to pension which certainly is well available under Rule 9 of the Central Civil Services (Pension) Rules.

4. In opposing this submission, Mr.G.Ramaswami, learned counsel for the 1st respondent urges first and foremost that the Food Corporation of India (Staff) Regulations do not provide for a similar rule as Rule 9 of the Central Civil Services (Pension) Rules. When section 12-A (4)(b) of the Food Corporation of India Act specifically provides for exercise of an option, it merely means the option is exercised so as to get these benefits like leave, provident fund, retirement and other terminal benefits. By that option, rule 9 of the Central Civil Services (Pension) Rules does not get attracted. Therefore, where such a rule as rule 9 was not provided for in the Staff Regulations, it is impossible to conceive that this rule will get incorporated by reason of the option. This is because if that were the position, the 1st respondent would not have opted at all and put himself to a detriment. Besides, as rightly held by the learned single Judge, it is only the benefits available under the Pension Rules that were opted for and not the continuation of the disciplinary proceedings. In any event, inasmuch as without any reservation or qualification the first respondent was retired on 11-5-1975 no proceeding could be continued under Rule 9, unless it has been so specifically stated.

5. In order to appreciate the respective contentions of the parties, we have got to provide a little legal backdrop. One thing that is striking in this case, as, rightly contended by Mr.G.Ramaswamy, that the Food Corporation of India Staff

Regulations do not provide for continuance of a disciplinary proceeding after the retirement of an employee of the Corporation. It is in this connection the question arises how are the terminal benefits to be worked out. For this, the answer is found in section 12-A (4)(b) of the Food Corporation Act. It reads:-

"Every Officer or other employee transferred by an order made under sub-section (1) shall, within six months from the date of transfer, exercise his option in writing to be governed by the leave, provident fund, retirement or other terminal benefits admissible to employees of the Central Government in accordance with the rules and orders of the Central Government as amended from time to time or the leave, provident fund or other terminal benefits admissible to the employees of the Corporation under this Act, and such option once exercised shall be final."

A careful reading of that section clearly shows that it is open to an employee of the Corporation to exercise his option with reference to the following (1) Leave (2) Provident Fund (3) retirement and (4) other terminal benefits. Once such an option is exercised that becomes final. Thereafter, it is not open to him to say because it is disadvantages to him, he revokes his option. It was in this background that the first respondent exercised his option on 1-3-1974 to the following effect:

"Having understood the comparative advantages and disadvantages of the leave, provident fund, retirement and other terminal benefits, admissible to the employees under the Central Government and the FCI, I opt to be governed by (i) leave, provident fund, retirement and other terminal benefits admissible to the employees of the Central Government, in accordance with the rules and orders of the Central Government, as amended from time to time".

A careful reading of this option merely shows that the option decides the benefits which we have catelogued will be available to the first respondent in accordance with the rules and orders of the Central Government, as amended from time to time. These benefits are found in Chapter V, Rules 35 to 41 of the Central Civil Services Pension Rules. Therefore, if there is any amendment to those rules, those amendments will undoubtedly apply to the first respondent as well. It is in this background we have got to see whether there is any scope for applying rule 9 of the Central Civil Services Pension Rules. That rule reads:-

"9. Right of President to withhold or withdraw pension. (1) The President reserves to himself the right of with-holding or with-drawing a pension or part thereof, whether permanently or for a specified period, and of ordering recovery from a pension of the whole or part of any pecuniary loss caused to the government, if, in any departmental or judicial proceedings, the pensioner is found guilty or grave misconduct or negligence during the period of his service including service rendered upon re-employment after retirement:

Provided that the Union Public Service Commission shall be consulted before any final orders are passed:

Provided further that where a part of pension is withheld or withdrawn, the amount of such pension shall not be reduced below the amount of rupees sixty per mensem.

(2)(a). The departmental proceedings referred to in sub-rule (1) if instituted while the government servant was in service whether before his retirement or during his re-employment, shall, after the final retirement of the government servant, be deemed to be proceedings under this rule and shall be continued and concluded by the authority by which they were commenced in the same manner

as if the government servant had continued in service:

Provided that where the departmental proceedings are instituted by an authority subordinate to the President, that authority shall submit a report recording its findings to the President.

(b) ...."

We are of the view that inasmuch as neither section 12-A (4)(b) nor the option exercised by the first respondent on 1-3-1974 has anywhere stated pro tanto the Pension Rules will apply, it is impossible for the Corporation to rely upon rule 9. This is because, as we have stated earlier, inasmuch as the Food Corporation of India Staff Regulations do not provide for continuance of a disciplinary proceeding after the retirement of an employee, to confer such a power as claimed under rule 9 of the Pension Rules, there must be an express statement. This cannot arise by way of implication because such an implication is not even stated anywhere either in the Food Corporation of India Act or under the Staff Regulations or even in the option. This will be reading something into the Staff Regulations for which no express provision was ever made. Of course, if section 12-A (4)(b) had stated that once an option is exercised, all the rules '*mutatis mutandis*' would apply to the Corporation employees, then perhaps there is something to be said in favour of the Corporation. But no such thing arises in this case. Besides, we have already seen from the narration of facts that the first respondent who was originally a Central Government employee serving in the Food Department became an employee of the Corporation. Therefore, in so far as rule 9 contemplates enquiry against a government servant unless there is a specific reference of such a rule being made applicable to the employees of the Corporation, it is impossible to confer such a power on the Corporation. Therefore, though not for the reasons stated by the learned single Judge in the Judgment under appeal, for different reasons, viz. as stated above, we confirm the order of the learned single Judge. Accordingly, we dismiss the appeal. There will be no order as to costs.

R.S. ----- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *S.Mohan* and *S.Swamikkannu, JJ.*

*A.S.No.399 of 1978. *9th August*, 1984.

The Union of India, Eastern Railway, by its General Manager at Calcutta *Appellant**

v.

Messrs.St.Joseph Textiles, Karur by its Partner M.Kulandaisamy *Respondent.*

Railways Act (IX of 1890), section 77(2) - Railways - When entitled to protection under section 77(2).

On the question whether the railway is entitled to protection under section 77(2) of the Railways Act, in respect of loss of goods arising after the expiry of the period of seven days after termination of transit,

Held:- It is not for the Court while interpreting a particular section to add words to a piece of legislation. When Parliament in its wisdom says 'the railway is not responsible in any case'

in section 77(2) of the Railways Act there is absolutely no scope to introduce the words 'shall not be responsible as a bailee'. If that were the intention of Parliament, nothing would have been easier for it than to use the words 'as bailee'. No doubt it is a cardinal rule of construction that a sub-section alone cannot be read in isolation and the entire section must be read as a whole. Even then what appears from a reading of the entire section is that, sub-section (1) talks of liability within the period of 7 days after the termination of transit; undoubtedly such termination of transit includes free time allowed depending upon the situation. During that time the railways under sub-section (1) will be liable as a bailee, for loss, destruction, damage, deterioration and non-delivery. It is that situation that is contemplated under sub-section (1). As against this sub-section (2) talks of liability after the expiry of seven days after the termination of transit. Here again free time was allowed. Therefore the railway administration's responsibility not only as a bailee, but even otherwise, ceases by the operation of this sub-section. Therefore, it is a totally different contingency contemplated than what was conceived under sub-section (1). Read in this way, there is absolutely no justification to import the word 'as a bailee'; sub-section (2) is a part of section 77 itself. Sub-section (4) merely reiterates the entitlement of the railways to collect demurrage or wharfage as defined under clause (d) and clause (h) of section 46-C. In other words, this talks of a situation where the goods are still available for removal. Removal of goods pre-supposes such availability. Therefore there is no inter-connection between sub-section (4) and sub-section (2) to import the words as 'bailee' into sub-section (1). *[Para.18]*

Cases referred to:-

Lloyd Bituman Products (P) Ltd. v. Union of India, (1980)2 M.L.J.363; *Union of India v. Ramchand, K. and Co.*, A.I.R. 1974 Mad.335; *Union of India v. Jetmall Sukanraj*, (1971)2 M.L.J.257: A.I.R.1972 Mad.134; *M & S.M.Ry., Co., Ltd. v. Haridoss Banmalidoss*, (1918) I.L.R.41 Mad. 871: 35 M.L.J.35; *Governor-General-in-Council v. Mutsaddi Lal*, (1961)1 M.L.J. (S.C.) 169: (1961)1 An.W.R. (S.C.) 169: (1961)1 S.C.J.597: (1961)3 S.C.R.647: A.I.R.1961 S.C.725; *Union of India v. Firm Laxminarain*, A.I.R. 1963 Raj.162; *Uttam Singh v. Union of India*, A.I.R. 1971 Delhi 79; *Union of India v. West Punjab Factories Ltd.*, (1966)1 S.C.J. 350: (1966)1 S.C.R.580: A.I.R.1966 S.C.395.

B.T.Seshadri, for Appellant.

M.Srinivasan for R.Vedantham, for Respondent.

The Judgment of the Court was delivered by

Mohan, J.:- Defendants 1 and 2, the Union of India, Eastern Railway by its General Manager at Calcutta and the Union of India, Southern Railway by its General Manager, Park Town, Madras are the appellants before us.

2. The appeal arises out of O.S.No.114 of 75 on the file of the Sub Court Karur. The said suit was filed by the sole respondent herein for recovery of a sum of Rs.53,411.93. The averments in the plaint are as under:- The plaintiff is a firm doing business in Textiles at Karur. One Ganesh Chandra Das of Azim Ganj, West Bengal came to Karur. He selected handloom clothes worth about 53,441.93 to be booked on plaintiff's self pass to Azim Ganj City Railway Station. He sent the parcel Way Bill along with the demand draft for a sum of Rs.52,672.93 being the price of the goods supplied less railway freight of Rs.769/- to the State Bank of India at Jiaganj. It was undertaken to clear the demand draft by payment to the Bank and take the parcel way Bill from the Bank. The plaintiff booked for carriage at Karur Railway Station on 11.6.73 under parcel Way Bill 835434 dated 11-6-73. The plaintiff sent the said way Bill and the demand draft to the State Bank of India at Jiaganj. The normal time for the goods to reach the destination would be not less than

thirty days. The State Bank of India delivered back the demand draft and the parcel Way Bill to the plaintiff on 12-9-73 for the reason that the payment was not forthcoming. Therefore on 12-9-73, the plaintiff addressed the Station Master, Azimganj requesting to re-book the goods to Karur. The plaintiff also enclosed the original parcel Way Bill endorsed in its favour along with General Forwarding Note duly signed to enable the Station Master to re-book the goods to Karur. This letter was acknowledged by the Station Master, Azimganj on 18-9-73. He did not choose to send any reply. Thereafter the plaintiff sent an express reply paid telegram on 4-10-73. It was also followed by a letter of even date sent by registered post. To neither of these was there any reply. A copy of it was sent by post to the Chief Commercial Superintendent, Eastern Railway Calcutta. In response to the above, the Station Master of Azimganj City alone sent a reply on 15-10-73 stating that he had already sent a letter dated 27th September, 1973. Further the plaintiff's letter had been forwarded to the Divisional Commercial Superintendent, Eastern Railway Howrah, and Chief Commercial Superintendent, Eastern Railway, Calcutta and that he had not received any reply from the Officers. The matter would be disposed of as soon as the order was received from the Office. The plaintiff sent telegrams to the Chief Commercial Superintendent and the General Manager, Eastern Railway on 6-10-73. On 8-10-73, the plaintiff addressed a further letter by registered post to the Station Master, Azimganj, to the General Manager, Eastern Railway and the Chief Commercial Superintendent, Eastern Railway by way of reminders. On 8th October, 1973 the plaintiff gave notices of claim for Rs.53,441.93 as is required under section 78 of the Indian Railways Act to the General Manager (Claims) Eastern Railway, Calcutta and the General Manager (Claims) Southern Railway, Madras. In those notices, it was stated that the Railway administration is grossly negligent and mis-conducted itself and was careless in handling the goods and in not rebooking and delivering the goods back to the plaintiff. The notice was sent on 9.10.73 to the General Manager, Eastern Railway, Calcutta and General Manager, Southern Railway, Madras. The Chief Commercial Superintendent sent a letter dt. 7.11.73 acknowledging the receipt of copy of suit notice. By the letter dt. 31.10.73, the plaintiff desired the Divisional Superintendent, Eastern Railway, Howrah to return the parcel Way Bill, which had been sent to the Station Master, Azimganj, which according to the Station Master's letter had been forwarded to the former for action. To this also, there was no response. By reason of non-delivery of goods, the plaintiff has suffered damages and therefore the defendants are bound to pay Rs.53,441.93. Hence the suit.

3. In the written statement and additional written statement filed by the defendants, the stand taken is as follows:- It is denied that the plaintiff is the owner of the goods. The particulars and the value of the goods are denied. The parcel and the parcel way bill were carried with due care and caution. They reached Azimganj City Railway Station on 1.7.73 in good condition and were made available for delivery for more than seven days, no one turned up for taking delivery. On 21.7.73, the parcels were taken delivery of by one Sunil Dutta against the parcel way bill produced by him under clear signature on payment of all charges due to the Railway. About two months after the termination of transit i.e. on 12-9-73, a request is alleged to have been made to the Station Master of the destination for rebooking the parcels to Karur. The defendants are not liable in law for the alleged non-delivery of the suit parcels that occurred seven days after the termination of transit. In other words, they would be protected by section 7(2) of the Indian Railways Act. It is denied that there was any valid claim notices under section 78 B of the Indian Railways Act. Nor again was there a proper suit notice under section 80 CPC. There was no negligence, misconduct

or carelessness on the part of the defendants or any one of its servants. The defendants are not liable in cases where fraud was practised by the consigner or the consignee or their agents. The suit is bad for non-joinder of the consignee. In any event, the suit claim is highly exaggerated. The delivery was effected in good faith. The plaintiff is responsible for the acts of misconduct, carelessness and negligence. Even assuming that the Railway receipt on which the delivery was effected is to be treated as not a genuine one the railways are not liable and the loss occurred after seven days of the termination of transit of suit parcels at the destination. In the reply statement, it is stated that for the delivery of the goods even if it is on a forged receipt, so far as it was done without good faith, the railways would be responsible for the acts of misconduct.

4. On these pleadings, the following nine issues originally were framed. Thereafter on 12.9.77 two other additional issues were framed. They are as follows:-

1. Whether the plaintiff has got right, title and interest in the suit property.
2. Whether the plaintiff is a registered firm as per the provisions of the Indian Partnership Act.
3. Whether Ganesh Chandra Das placed orders for the suit goods and desired the goods to be booked to Azimganj as contended by the plaintiff.
4. What is the value of the goods.
5. Whether there were valid notices under section 78 B of the Indian Railways Act and section 80 C.P.C.
6. Whether there was gross and culpable negligence on the part of the defendants in handling the goods.
7. Whether the suit is bad for-non-joinder of parties i.e. consignee?
8. Whether the defendants are absolved of the liability under the Railways Act relating to the suit claim or any other claim.
9. To what relief if any is the plaintiff entitled?

The following additional issues were framed on 12th September, 1977:-

1. Whether the delivery pleaded by the defendants is true and in good faith.
2. Whether the defendants are not laible under section 77(2) of Indian Railways Act.

5. On issue No.2, it was answered that the plaintiff is a registered firm as per the provisions of the Indian Partnership Act. On issues 1 and 3 it was held that Ganesh Chandra Das placed orders for the suit goods and desired the suit goods to be booked to Azimganj City and that the plaintiff retained the title and ownership in the suit goods until the payment of price of the goods by Ganesh Chandra Das. He did not pay the price of the goods and in view of the circumstances plaintiff has got right, title and interest in the suit goods so as to enable the plaintiff to file the present suit. On issue No.4 it was held that there is sufficient and satisfactory evidence available showing that the value of the suit goods is Rs.53,441.93. On issue No.5, it was held that the notices under section 78 B of the Indian Railways Act and section 80 CPC have been issued and they are valid under law. Under issue No.7, it was held that the suit was not bad for non-joinder. On issues 6, 8 and additional issues 1 and 2, it was held that in so far as the delivery took place without good faith, on a forged railway receipt, the railways would be liable under section 76 B of the Indian Railways Act. The protection under section 77(2) of the said Act will not be applicable to the railways. Issue No.9 was answered saying that the plaintiff would be entitled to the value of goods at Rs.53,441.93 together with interest at 6% per annum from the date of plaint till realisation. The plaintiff was also held to be entitled to costs. Thus the suit was decreed as prayed for. Aggrieved by the judgment and decree, the defendants have come up in appeal before us.

6. Mr.B.T.Seshadri, learned counsel for the appellants urges the following points for our consideration. In the instant case, the records bear out that on 1.7.73 the consignment booked by the plaintiff and sent by the railways

reached the destination. Till 20th July, 1973, there was no claim. Thereafter on 21-7-73, the delivery was effected. Under those circumstances, having regard to the liability of the railways under section 73 of the Indian Railways Act which speaks of the liability during transit that would not apply. Therefore it is only section 77 of the said Act, that would apply. Under section 77(1) of the Act, the liability of the railways is that of a bailee under sections 151, 152 and 161 of the Indian Contract Act. In this case that again will not apply. Therefore it is only section 77(2) that will squarely apply to the facts of this case. In other words, according to him the railway is not duty bound to explain how the goods were delivered after the 7th day. Therefore it would amount to a total extension of liability after a period of seven days. This was so laid down by a division bench of this Court in *LLYOD BITUMAN PRODUCTS (P) LTD. v. UNION OF INDIA*, (1980)2 M.L.J.363. At that time the limitation that was contemplated under this Act was thirty days. It was now by reason of the amendment reduced to seven days.

7. Even in a case of non-delivery, whatever may be the reason, it would fall under section 77(2) of the Indian Railways Act. In considering the meaning of non-delivery which arose under old Article 11 of the Limitation Act where again it was a case of delivery on forged railway receipts, this court took this view in *UNION OF INDIA v. RAMCHAND K. & CO.*, A.I.R.1974 Mad.335 at 337. Non delivery implies failure to deliver for some reason or other. Then again in *UNION OF INDIA v. JETMALL SUKANRAJ*, (1971)2 M.L.J.257= A.I.R.1972, Mad.134 while considering the scope of section 77 B where non-delivery was not included, it was held that whatever may be the reason for failure to deliver that would amount to non-delivery. Even if there was wilful delivery to a person, who was not entitled to the goods, that would amount to non-delivery. It has been so laid down in *M & S.M.Ry. Co., Ltd. v. Haridoss Banmalidoss*, (1918) I.L.R.41 Mad.871= 35 M.L.J.35.

8. While considering the scope of section 77, the Supreme Court in *Governor-General-in-Council v. Masaddi Lal*, (1961)1 M.L.J. (S.C.) 169= (1961)1 An.W.R. (S.C.)169= (1961) S.C.J.597= (1961)3 S.C.R.647= A.I.R.1961 S.C.725 that though the section contemplates failure to deliver on account of three factors, namely (1) loss; (2) destruction; (3) deterioration, it would still apply to a case of negligence or inadvertence. The learned counsel himself fairly concedes that this case may not be of much assistance because by reason of the amendment, non-delivery has come to be included. The reason why it is cited is that where negligence as alleged in this case is made out, even then it would amount to non-delivery. In *Union of India v. Firm Laxminarain*, A.I.R.1963 Raj.162 where again the delivery was made to a wrong person under forged railway receipt, it was held that mis-delivery would fall under loss as stated under section 77. In a case, where the railway servant himself committed theft under old section 75 which corresponds to section 77B of the new Act, the Delhi High Court in *Uttam Singh v. Union of India*, A.I.R.1971 Del.79 held that such a case also would amount to non-delivery.

9. Lastly it is submitted that the learned single Judge of this court, in dealing with more or less identical situation held that section 77(2) of the Railways Act would give complete protection to the railways, if there is failure to deliver irrespective of the reasons, after the 7th day in transit.

10. For all these reasons, it is submitted that assuming for a moment that the railway was careless or negligent in making delivery as against the forged railway receipt, in so far as the Court below held that the railways would be liable under section 76 B of the Indian Railways Act, the judgment cannot be supported. It is argued that section 77(2) will give complete protection to the railways because admittedly the plaintiff did not ask for rebooking of the goods within seven days as prescribed under section 77(2) of the Act.

For all these reasons the judgment and decree of the court below are liable to be set aside.

11. As against this, Mr.M.Srinivasan, learned counsel for the respondent would urge that the interpretation placed by the learned counsel for the Railways of Section 77 is wrong. Section 77(1) talks of the duty of the railways as a bailee. It is not as a bailee under the Indian Railways Act, but as a bailee under sections 151, 152 and 161 of the Indian Contract Act. Having said so, when section 77(2) talks of 'for any reason', it is referable to the earlier sub-section. Section 77(2) cannot be construed in isolation. It must be construed in the context in which the sub-section appears. Therefore what is emphasised is that the duty as a bailee on the part of the railways ceases after the seventh day. However, still the liability as a 'carrier' would apply because that is evident from section 77(4) wherein the railways are still entitled to claim either wharfage or demurrage. This position is clear by a reading of the decision in *Union of India v. West Punjab Factories Ltd*, (1966)1 S.C.J.350= (1966)1 S.C.R.580= A.I.R.1966 S.C.395.

12. In this case even when factually it is established that so far as the evidence of D.W.1 is concerned, that has been disbelieved by the Court below and Ex.B.6 namely the railway receipt on which the delivery was effected, was held to be a forged one, the railways had not proved that the delivery took place on 21.7.73. The failure on the part of the railway is established. There is every justification to held that the delivery took place even within seven days in transit. Therefore the plaintiff will be entitled to the decree. From that point of view, the decree can be upheld. The interpretation placed on section 77 if accepted, would amount to putting a premium on the negligence or carelessness of the railways.

13. In reply Mr.B.T.Seshadri says that there is absolutely no interconnection between sub-section 2 and sub-section 4 of section 77. Sub-section 4 of section 77 talks of the entitlement of the railways to collect wharfage or demurrage so long as the goods are available for delivery, certainly it is not open to the consignor or consignee to say that he is not liable for demurrage or wharfage because the period of seven days had come to an end. Section 77(4) only reiterates the entitlement of the railways to collect either wharfage or demurrage. *Union of India v. W.P.Factories*, (1966)1 S.C.J.350= A.I.R.1966 S.C.395 is a case, which arose before the amendment. Though railways would be liable as a carrier, it is not governed by the Common Carriers Act. Section 72 of the old Act did not contain the words 'in transit' unlike present section 73. All that the Supreme Court held was that when the Railways were entitled to collect wharfage, their liability would not get terminated unless the option is exercised under section 55 or section 56 of the Railways Act. Beyond that, it does not help the respondent herein in any manner.

14. Having regard to the above arguments, two questions arise for our consideration:-

1. When did delivery take place and

2. Are the Railway entitled to claim the protection of section 7(2) of the Act?

The admitted facts are:- 21 bales of handloom goods were booked at Karur Railway Station on 11-6-73 to Azimganj Railway Station. The copies of invoices are Ex.A-2 and A-3. The consignment was addressed to 'self' P.W.1 speaks to the fact that a demand draft namely hundi prepared by the plaintiff for a sum of Rs.52,672.93 namely the value of the goods at R.53,441.93 less the Railway freight of Rs.769/- under Ex.A-4 was sent through State Bank of India. This was accompanied by the original Railway Receipt Ex.B-1, for the purpose of collection of the amount covered under Ex.A-4 from Ganesh Chandra Das of Azimganj. The collection agent was State Bank of India at Berhambure.

Normally after honouring the hundi under Ex.A-4, Ganesh Chandra Das would get title to the suit goods so as to enable him to take delivery of the suit goods from the destination. Ex.A-4 along with the railway receipt were returned by the State Bank of India to the plaintiff on 12.9.1973, along with a covering letter Ex.A-8 mentioning the reason as O.N.P. meaning payment not forth coming. It is thereafter the plaintiff wrote a letter on 12.9.73 addressing to the Station Master, Azimganj City requesting him to re-book the suit goods to Karur. Along with that letter, he also enclosed the original parcel way Bill endorsed in its favour, together with the general forwarding note duly signed to enable the Station Master to re-book the goods to Karur. Admittedly the Station Master acknowledged the letter on 18.9.73. No reply was sent. The plaintiff sent an express reply paid telegram on 4.10.73. On even date, a letter by registered post was also sent. For this there was no reply. A copy of it was sent by registered post to the Commercial Superintendent, Eastern Railway, Calcutta. On 15.10.73, a letter was sent under Ex.A-22 stating that he had sent a letter dt. 27.9.73, that the plaintiff's letter had been forwarded to the Divisional Commercial Superintendent, Eastern Railway Howrah, and Chief Commercial Superintendent, Eastern Railway Calcutta, and that he had not received from the officers and the matter would be disposed of as soon as the orders were received from the Office. The plaintiff sent telegrams to the Chief Commercial Superintendent and the General Manager, Eastern Railway on 6-10-1973. On 8-10-1983 under Ex.A-16 the plaintiff sent further letters by registered post to the General Manager, Calcutta and the General Manager, Southern Railway, Madras, namely defendants 1 and 2 the appellants before us. These facts are not in controversy.

15. As regards the delivery of the goods, we have got to look into the evidence both documentary and oral. Ex.B-6 is the Railway Receipt on which delivery was effected. It is now beyond dispute that this is a forged receipt. That shows that delivery was affected, to Viswanath Dutta and Sons on 21.7.73. Because it is a forged document, much weight cannot be attached to this. However, there is Ex.B-7 against which absolutely no attack was made by the plaintiff when D.W.1 was in the box. That Register maintained at the railway Station at Amizganj, shows that the goods were received on 1.7.73 and delivered on 21-7-73. There is also an endorsement to the effect that the railway receipt on which the delivery was given, was taken by the consignee. Therefore, *prima facie* if we go by this document against which no attack was ever made as we said above, it would clearly establish that the delivery did take place only on 21.7.73. We are unable to accept the argument of Mr.M. Srinivasan, learned counsel for the respondent-decree-holder that because the evidence of D.W.1 had come to be disbelieved in that he was careless and negligent in delivering the goods as against a forged receipt and further he did not even take elementary care to verify whether Ex.B-6 was genuine or not, the railway has failed to establish the delivery on 21.7.73. Apart from the documentary evidence of which we have just now made a reference, even the oral evidence supports this. D.W.1 who is the senior booking clerk at Azimgenj City Railway Station states in chief examination that:

> "The book shown to me is the unloading cum delivery book kept in Azimganj City Railway in regular course of official duties and it is for the period from January 1969 upto September 1973. As it is a small station, we do not maintain two books one for unloading and another for delivering to parties separately. Ex.B-7 is the entry in the said book relating to suit goods. We received the said goods at our railway station on 1-7-73. The said goods were in 'condition."

As against this, there is absolutely no evidence let in on the side of the plaintiff that delivery took place within seven days in transit. Therefore as rightly held by the learned

Subordinate Judge that the goods were received at the destination station on 1.7.73 and wrong delivery was made on 21.7.73. We are unable to see how this finding can be attacked in view of the overwhelming evidence to which we have made a reference. However, one thing is clear in this case. The Railways had been extremely negligent or careless in making delivery of the goods. It is the evidence of D.W.2 that in respect of Railway receipt containing 'to pay', three receipts are prepared at the forwarding station; one copy will be with the Railway Guard along with the goods. That copy has to accompany the goods to the destination station. One copy is given to the consignor and another is kept in the forwarding station itself. If the R.R. contains the endorsement 'paid', four copies are prepared at the forwarding station. The copy of the R.R. given to the railway guard along with the goods is called "guard's foil" which accompanies the goods to the destination. It is also admitted by him that the guard's foil will be kept till the end of the guard's foils will be sent to the accounts section before the 7th of every succeeding. month. Therefore normally it would be expected of the railways to keep the guard's foil till the end of July 1973. That has to be sent to the accounts section only on the 7th of the succeeding month, namely August 1973. If really guard's foil was there on 21.7.73 when delivery took place then D.W.1 by a comparison of the said foil with Ex.B-6 would have come to the conclusion that it is a forged document. The guard's foil is the copy of Ex.B-1. Even a casual comparison of Ex.B-1 with Ex.B-6 would have shown to him that Ex.B-6 was a forged one. It is clear that the Way Bill number is printed horizontally from left to right in Ex.B-6 while the way bill number in Ex.B-1 is printed vertically. The Freight charges in Ex.B-1 is Rs.732.40 while in Ex.B-6 the amount is Rs.739/-, 5% charge is mentioned as Rs.36.60 in Ex.B-1 while the same charge is mentioned as Rs.30/- in Ex.B-6. Apart from this, even the spelling of way bill is entirely different. Therefore, there is utter carelessness on the part of D.W.1. It is somewhat surprising the Railway should have been advised to take an extreme stand that no guard foil was given in this case. This plea is to be stated to be rejected.

D.W.1 admits that normally Azimganj City Railway Station is a small Station. It used to receive one or two bales at a time. Therefore, when it received 21 bales far in excess of the normal receipts atleast he should have used his common sense whether the railway can deliver the goods as against Ex.B-6. There are clear instructions contained as to the delivery against such R.Rs. The instructions are as under:

> "Instructions regarding prevention of delivery of goods on forged Railway receipts are being reiterated from time to time.
>
> 2. The following points are again notified for strict adherence by the staff:-
> i. The existing rules regarding sending of through invoices by post should be rigidly enforced.
> ii. When delivery of a valuable consignment (i.e. consignment exceeding approximately Rs.1,000 in value) is demanded by a person not known to the station staff, delivery should not be given until the Railway Receipt is compared with the through Invoice. If the through Invoice is not available, the station staff should request the party to get himself identified by someone known to the station staff. If he refuses to do this, delivery should be given only after the station master is satisfied of the *bona fides* of the person asking for the delivery. If necessary, an urgent telegram "may be sent to the sending station to get the booking particulars confirmed before delivery is effected.
> iii. The station master should be careful in delivering the consignments which are not of a nature normally received at his station.
> iv. If the Railway Receipt is lost delivery of parcels or goods should be granted to the consignee on execution of an Indemnity Note provided

the Station Master is satisfied that the person claiming the consignment is really the consignee. In all cases where the Station Master is not satisfied that the person claiming the consignment is really the consignee the matter should be referred to the Divisional Commercial Superintendent for orders. In no case delivery be given by the Station Master, if it is demanded by a person not known to the Station Master. Similarly no delivery on Indemnity Note should be given for such consignments which are of nature not normally received at the station until all invoiced particulars are properly verified and party's identify established.

v. It should be ensured that all important documents like Railway Receipts etc. should be kept in the Personal custody of a responsible official of the station nominated for this purpose; and

iv. Delivery on Indemnity Note should not be granted without prior permission of the Divisional Commercial Superintendent in cases;

(a) where consignments claimed by a person other than the invoiced consignee or by a person when the column of consignee on the way bill is erroneously left blank by the booking station;

(b) consignments through booked from abroad;

(c) Consignments claimed by more than one person and

(d) consignment booked to sender when the sender is not personally known at the destination station.

Railway receipt books on receipt from forms Depot should be very carefully checked for any missing/defective foils. Any loss of Railway Receipt books/foils should be immediately reported to the concerned authorities.

3. Instructions also exist vide para 1813 of Commercial Manual (vol.II) regarding maintenance of the Inward Invoice Index Register at the stations. Unless the staff concerned at the stations/goods sheds maintain them correctly and promptly, it may not help the R.P.F/C.R.P/C.I.D. taking preventive and detecting action in cases of delivery of goods on forged Railway/Receipts.

4. It is also imperative that the Station Master Goods Clerks/Commercial Inspectors/Accounts Inspectors who came to know of the deliveries, if any on forged Railway Receipts should, without loss of any time report to the local Government Railway Police concerned."

The failure to follow this instruction cannot but amount to utter carelessness on the part of the Railways. It is most surprising that a senior clerk like D.W.1 would foign ignorance of the clear instructions. Then again at no point of time, in spite of repeated requests of the plaintiff to re-book the goods, the Railways came with the plea that the goods have already been delivered on 21.7.1973 itself. Even Ex.A-22, namely the letter received from the Station Master of Azimganj did not mention about the delivery. That shows how careless the office concerned in this case were. We only mention this to uphold the finding that there has been utter lack of good faith on the part of the railways in delivering the goods. With this, we now leave the first point.

16. We will now refer to the important provisions of the Indian Railways Act, 1890 hereinafter referred to as the Act. Chapter VII is "responsibility of railway administration as Carriers." Section 72 speaks of execution of forwarding notes in respect of animals or goods carried on railway. Section 73 catalogues the general responsibility of a railway administration as a carrier of animals and goods. At this stage itself it is ncessary for us to mention that the railways cannot be held to be liable as a common carrier. Its liability is limited only by this section, namely section 73 of the Act. Leaving out other sections, we will how extract section 76-B because the liability of the railway as foisted by the Parliament was only by this section.

"76-B where a railway administration to which animals or goods are delivered to be carried by railway delivers them in good faith to a person who produces the original railway receipt, the railway administration shall not be responsible on the ground that such person is not legally entitled thereto or that the endorsement on the railway receipt is "forged or otherwise defective."

A careful reading of the above section would clearly disclose that where the goods are delivered in good faith to a person who produces the original railway receipt is the railway shall not be responsible on the ground that the person who produced the receipt is not legally entitled to the same. Having regard to the finding of the learned Subordinate Judge himself that delivery in this case took place as against the forged railway receipt Ex.B-6 and that too without any good faith we see absolutely no scope for applying section 76-B of the Act at all. To illustrate what we have in mind; supposing the original railway receipt is lost. X picks it up and produces the same before the Railways for delivery. In such a case the railways without knowing whether he had legal title to the property or not, if in good faith delivers, the railway is absolved of the liability under section 76 B. Therefore by no stretch of imagination can it be said that the railway is liable to the plaintiff under this section. Suffice it to dispose of that finding.

17. Now we came to section 77 on which a good deal of argument has been addressed on both sides. Therefore it is worthwhile to quote the entire section.

"77(1).A railway administration shall be responsible as a bailee under sections 151, 152 and 161 of the Indian Contract Act 1972, for the loss, destruttion, damage, deterioration or non-delivery of goods carried by railway within a period of seven days after the termination of transit;

Provided that where the goods are carried at owner's risk rate, the railway administration shall not be responsible for such loss, destruction, damage, deterioration or non-delivery except on proof of negligence or misconduct on the part of the railway administration or of any of its servants.

2. The railway administration shall not be responsible in any case for the loss, destruction, damage, deterioration or non-delivery of goods carried by railway arising after the expiry of the period of seven days after the termination of transit.

(3) Notwithstanding anything contained in the foregoing provisions of this section, a railway administration shall not be responsible for the loss, destruction, damage deterioration or non-delivery of the goods mentioned in the schedule, animals and explosives and other dangerous goods carried by railway, after the termination of transit;

(4) Nothing in the foregoing provisions of this section shall relieve the owner of animals or goods from liability to any demurrage or wharfage for so long as the animals or goods are not unloaded from the railway wagons or removed from the railway premises.

(5) For the purposes of this Chapter:-
(a) unless otherwise previously determined, transit terminates on the expiry of the free time allowed (after the arrival of animals or goods at destination) for their unloading from railway wagons without payment of demurrage; and where such unloading has been completed within the free time so allowed transit terminates on the expiry of the free time allowed for the removal of the animals or goods from railway premises without payment of wharfage;

(b) "demurrage" and "wharfage" have the meanings respectively assigned

to them in clause (d) and clause (h) of section 46-C."

The definition of "demurrage" and "wharfage" as found in clause (d) and clause (h) of section 46 C is as under:

(d) "demurrage" means the charge levied after the expiry of the free time allowed for loading or unloading a wagon;
(h) "Wharfage" means the charge levied on goods for not removing them from the railway premises after the expiry of the free time allowed for such removal."

About this we will deal with a little later. The section which requires our attention is section 77B. We have to find out the legal background of this section. By Central Act 31 the railway Act was amended. Originally, responsibility of railways as carriers of animals and goods was that of a bailee. As it was desired that this liability must be changed to that of a 'common carrier' the amendment was introduced. Therefore though section 73 of the old Act used the word 'bailee' that was altered by this amending Act as A 'common carrier'. As a result, the burden which was originally cast upon the claiments to prove misconduct on the part of the Railway administration has now been shifted to the administration. In such a case therefore it has to prove that it exercised due diligence and care in the carriage of animals or goods. It was also desired that under section 77 of the Act, the period of liability must be fixed as far as the railway administration was concerned as a bailee for loss; destruction; damage, deterioration or non-delivery of goods carried by it after termination of transit. Originally section 77(2) of the Act talked of 'thirty days'. By reason of the amendment made under Central Act LXXI of 1972 that period of thirty days has been reduced to seven days.

18. As to what would be the liability of the Railways for loss after the seven days of termination of transit came up for consideration before a Division Bench of this Court reported in *Lloyd Bituman Products (P) Ltd. v. Union of India*, (1980)2 M.L.J.363. Barring the singular fact that the case dealt with a situation obtainable before this amendment to which we have just now made a reference, namely thirty days, the ratio of that ruling squarely applies to the facts of this case. The learned Judges, after referring to the Judgments of two learned single judges of this court held:-

"With respect, we may say that the ratio uniformly laid down in all the three cases referred to above sets out the position of law correctly. We have already referred to the unambiguous terms in which sub-section (2) of section 77 has been worded. The liability of the railway for a period of thirty days from the termination of the transit being absolute, in character it stands to reason that the absolvement of the liability must also be an unqualified and unrestricted one. The appellants cannot be heard to say that the railway administration is burdened with two types of liability one as a bailee of thirty days and the other as a mere custodian of goods after the period of thirty days. The argument of the appellant's counsel that the liability of the railway administration does not cease after the period of bailment is over on the expiry of thirty days in not based on any specific provision of law. We are not persuaded by the contention that too rigid an interpretation of section 77(2) may even lead to the railway administration appropriating the goods for itself and refusing to deliver the same. The facts of the case do not lend support for the advancement of this extreme contention. It is not the case of the appellants, nor is there any evidence to that affect, that the missing 10 bales of Hessian cloth were actually in the custody of the railway administration on 1st November, 1972 and the subsequent days noted in Ex.A-19 when P.W.1 went to Salt Cotaurs to take delivery of

them and in spite of the bales being physically available for delivery the administration refused to deliver the goods in exercise of its rights under section 77(2) of the Act."

Therefore it is clear from this case that the railway administration cannot be held responsible as a bailee or a warehouse man for such destruction; damage or deterioration or non-delivery of goods arising after the expiry of the period of seven days after termination of transit. The learned single Judge of this court (Sengottuvelan, J.) in dealing with an identical situation of delivery as against wrong receipts in CS.275/75 dt. 28.3.80 held under issues 2, 3 and 7 as follows:-

C.S.275/75:- The Tamil Nadu Handloom Weavers Co-operative Society through its Planning Officer Mr.M.S.Ramakrishnan - Plaintiff v. Union of India rep. by the General Manager, Southern Railway Madras-3 and another. Defendants.

"The fact that the two consignments reached Kaliyaganj Railway Station is not disputed by the plaintiff. In fact, it is seen that after obtaining the delivery of the parcel on the strength of Exs.D/2 and D/3. Babu Datta, who took delivery of the parcel again booked a portion of the same as luggage from the very same Railway Station as per entries in the luggage ticket Ex.D/4. The fact that the consignment reached Kalyaganj Station also is borne out from the guard's foil Ex.D/5. When once the consignment had reached the destination station, the consignees are expected to take delivery of the same within 7 days of the termination of the transit and in case of goods mentioned in the second schedule of the Railways Act immediately after the termination of the transit. The railway administration is liable as bailee under sections 151, 152 and 161 of the Indian Contract Act only upto 7 days after the termination of the transit and upto the termination of transit in respect of the goods mentioned in the second schedule to the Railways Act. If such delivery is not taken within the prescribed time, the Railway Administration is not in any way liable for any on-delivery of the goods as per section 77 of the Indian Railways Act. Inasmuch as the consignors did not approach the Station Master, Kaliyaganj, till they wrote Ex.P/16 dt. 9.9.74, the Railway Administration is absolved from its liability as per section 77 of the Indian Railways Act. The consignment had landed at Kaliyaganj on 5.8.74. Taking the free time 48 hours as per Rule 1102 of the coaching tariff into account the transit terminates on 14.8.74 in respect of the cotton goods and on 7-8-74 in respect of silk goods. Since no claim for delivery was made before the termination of the transit the Railways cannot be made liable for the alleged non-delivery of the goods."

"Even otherwise section 72(2) of the Indian Railways Act is a complete answer to the claim of the plaintiff. A railway administration is responsible as a bailee under sections 151, 152 and 161 of the Indian Contract Act for the loss, destruction, damage, deterioration or non-delivery of the goods carried by railway within a period of 30 days after the termination of transit during the relevent period, and only 7 days now by reason of a subsequent amendment of section 77(1) of the Indian Railways Act."

"I further hold that the Railway administration is absolved of its liability in respect of the non-delivery of the suit consignment as per section 77 of the Indian Railways Act."

These two cases fully support the stand of Mr.B.T.Seshadri, learned counsel for the appellants. The contention of Mr.M.Srinivasan, learned counsel for the respondent that section 77(2) when it says that the Railway Administration shall not be responsible in any case would mean 'shall not be responsible as a bailee and that too a bailee as spoken under section 77(1) of the Act

cannot be accepted. It is not for us while interpreting a particular section to add words to pieces of legislation when Parliament in its wisdom says' the railway is not responsible in any case' there is absolutely no scope for us to introduce the words 'shall not be responsible as a bailee. If that were the intention of the Parliament, nothing would have been easier to use the words as a bailee". No doubt it is a cardinal rule of contract that a sub-section alone cannot be read in isolation and the entire section must be read as a whole. Even then what appears to us from a reading of the entire section is that, sub-section 1 talks of liability within the period of 7 days after the termination of transit, undoubtedly such termination of transit including free time allowed depending upon the situation. During that time, the railways under sub-section 1 will be liable as a bailee for loss, destruction, damage, deterioration and non-delivery. It is that situation that is contemplated under sub-section 1. As against this, sub-section 2 talks of the liability after the expiry of seven days after the termination of transit. Here again free time was allowed. Therefore the railway administrations' responsibility not only as a bailee, but even otherwise ceases by the operation of this sub-section. Therefore it is a totally different contingency contemplated then what was conceived under sub-section 1. Read in this light, we see absolutely no justification to import the words 'as a bailee'. Nor again are we, by this construction forgetting the fact that sub-section 2 is a part of section 77 itself. We are equally unable to accept the argument that sub-section 4 shall be read in the way in which Mr.M.Srinivasan, learned counsel wants to construe. Sub-section 4 as rightly contended by Mr.B.T,Seshadri learned counsel for the appellants merely reiterates the entitlement of the railways to collect demurrage or wharfage as defined under clause (d) and clause (h) of section 46C. In other words, this talks of a situation where the goods pre-suppose such availability. Therefore there is no interconnection between sub-section 4 and sub-section 2 to import the words "as a bailee" into sub-section 1.

19. Now we will deal with the ruling cited on behalf of the respondent-decree-holder, namely *Union of India v. West Punjab W.P. Factories Ltd.* (1961)1 S.C.J.350= (1966)1 S.C.R.580= A.I.R.1966 S.C.395. At page 401 in paragraph 17, it was stated as follows:-

"We now come to the additional point raised in Ishwara Nand's suit. It is urged that Ishwara Nand's consignment had reached Morar Road Railway station on February 23, 1943 and Ishwara Nand should have taken delivery within three days which is the period during which under the rules no wharfage is charged. The responsibility of the railway is under section 72 of the Indian Railways Act (No.9 of 1890) and that responsibility cannot be cut down by any rule. It may be that the railway may not charge wharfage for three days and it is expected that a consignee would take away the goods within three days. It is however, urged that the railway is a carrier and its responsibility as a carrier must come to an end within a reasonable time after the arrival of goods at the destination, and thereafter there can be no responsibility whatever of the railway. It is further urged that three days during which the railway keeps goods without charging wharfage should be taken as reasonable time when its responsibility as a carrier ends; thereafter it has no responsibility whatsoever. Under section 72 of the Indian Railways Act, the responsibility of the railway administration for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by railway is, subject to the other provisions of the Act, that of a bailee under sections 151, 152 and 161 of the Indian Contract Act (No.8/1872). This responsibility in our opinion continues until terminated in accordance with sections 55 and 56 of the Railways Act. The railway

has framed rules in this connection which lay down that unclaimed goods are kept at the railway station to which they are booked for a period of not less than one month during which time the notice as prescribed under section 56 of the Railways Act is issued if the owner of the goods or person entitled thereto is known, If delivery is not taken within this period, the unclaimed goods are sent to the unclaimed goods office where if they are not of dangerous, perishable or offensive character, they are retained in the possession of the railway. Thereafter public sales by auction can be held of unclaimed goods which remain with the railway for over six months. This being the position; under the rules so far as the application of sections 55 and 56 is concerned it follows that even though the responsibility of the railway as a carrier may come to an end within a reasonable time after the goods have reached the destination station, its responsibility as a wareshouseman continues and that responsibility is also the same as that of a bailee. Reference in this connection is made to *Chapman v. Great Western Railway Co*, (1880)5 Q.B.O.278. In that case what had happened was that certain goods had arrived on March 24 and 25. On the morning of March 27, a fire accidentally broke out and the goods were consumed by the fire. The consignor then sued the railway as common carrier on the ground that that liability still subsisted when the goods were destroyed. The question in that case was whether the liability of the railways was still as common carrier, on March 27 or was that of warehouseman. The question was of importance in English law, for a common carrier under the English Law is an insurer and is liable for the loss even though not arising from any default on his part while a warehouseman was only liable where there was want of proper care. It was held that the liability as a common carrier would come to an and not immediately on the arrival of the goods at the destination but sometime must elapse between the arrival of goods and its delivery. This interval, however, must be reasonable and it was held in that case that reasonable time had elapsed when the fire broke out on March 27 and, therefore, the railway's responsibility was not that of a carrier but only as warehouseman. The position of law in India is slightly different from that in England, for here the railway is only a bailee in the absence of any special contract and it is only when it is proved that the railway did not take such care of the goods as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value as the goods bailed, that the railway's responsibility arises. A warehouseman is also a bailee and, therefore, the railway will continue to be a warehouseman under the bailment, even if its responsibility as a carrier after the lapse of a reasonable time after arrival of goods at the destination comes to an end. But in both case the responsibility in India is the same, namely, that of a bailee, and negligence has to be proved. In view of the rules to which we have already referred it is clear that the railway's responsibility as a warehouseman continues even if its responsibility as a carrier comes to an end after the lapse of a reasonable time after the arrival of goods at the destination. The responsibility as a warehouseman can only come to end in the manner provided by sections 55 and 56 of the Railways Act and the Rules which have been framed and to which we have already referred as to the disposal of unclaimed goods. In the present case under the rules the goods had to remain at Morar Road Railway Station for a period of one month after their arrival there and Ishwara Nand came to take delivery of them on March 10 - well within that period. It may be that as he did not come within three days, he had to pay wharfage or what is called demurrage in railway parlance, but the responsibility of the railway

as a warehouseman certainly continued till March 10 when Ishwara Nand went to take delivery of the goods. As it has been found that there had been negligence within the meaning of sections 151 and 152 of the Indian Contract Act, the railway would be liable to make good the loss caused by the fire."

First of all this was a case which arose before the amendment. Under old section 72, the words 'in transit' were absent unlike in the present section 73 of the Act. All that their Lordships of the Supreme Court meant was that if there wan an entitlement on the part of the railways to collect wharfage or demurrage, their obligation does not cease till the right under sections 55 and 56 is exercised. Beyond this, it does not help in the interpretation of section 77(2) of the Act. For the sake of completion, now we will deal with the meaning of 'non-delivery'.

20. *Union of India v. Ramchand K & Co.* A.I.R.1974 Mad.335 was a case wherein the delivery was made against a forged railway receipt. Our leanred Brother V.Ramaswami, J. held that non-delivery implies the goods are not known to have been destroyed or lost but could not be delivered to the right person for some reason or other.

21. *In Union of India v. Jetmall Şukanraj*, (1971)2 M.L.J.257= A.I.R.1972 Mad.134 Ismail, J. (as he then was) considered the scope of section 77B of the Act. The learned Judge while pointing out that 'non-delivery' was not included under that section held:

"It must be noticed in this context that every case of loss or destruction will necessarily result in non-delivery, while every case of non-delivery need not be a consequences of loss or destruction of the goods. For instance, the goods might have been delivered to a wrong person and therefore there is non-delivery to the rightful person or the goods might have been appropriated by the railway administration to its own use under a wrong impression and therefore they are not available for delivery and consequent non-delivery results."

22. Even when it is a case of wilful delivery to a person not entitled to the goods, it was held to be non-delivery. In *M & S.M.Ry. Co. Ltd. v. Maridoss Banmali Doss*, (1918) I.L.R.41 Mad.871= 35 M.L.J.35 the following passage at page 884 makes it clear:

"The word 'loss' in the English language is, in my opinion sufficiently wide to cover cases where the goods are not forthcoming either from deliberate acts or from acts of negligence and I see no reason to confine it only to cases of the latter kind."

23. In *Uttam Singh v. Union of India*, A.I.R.1971 Delhi 79 where again the railway servant himself committed theft, the question arose whether it would amount to 'non-delivery'. No doubt that case dealt with old section 75. The ratio would equally apply, to section 77B as it is seen from the following passage (paragraph 17) at page 85 and page 87.

"There is abundant authority for the proposition that if any article of value is lost as a result of theft by railway servants there is a loss to the railway within the meaning of section 75 of the Act." Only ... On a review of all the cases and the construction of section 75 of the Act, we are of the view that if in respect of an article of value, the percentage charge required to be paid under section 75 of the Act has not been paid, the railway administration would not be liable for the loss of the article even though the loss has been occasioned by the negligence/misconduct of its servant or by theft even by the very servant to whom the goods are entrusted but there would be no "loss" within the meaning of section 75 of the Act. If the railway administration itself as distinct from its servants, has wrongfully detained or misappropriated such

that context, the above decision was given by the Supreme Court. In all fours, the said decision applies to the facts of the present case. In these circumstances, the judgment of the Courts below **cannot** be sustained.

5. For all **these** reasons, the Second Appeal is **allowed** holding that the suit is **maintainable.** The trial Court is directed to **dispose** of the suit on merits. There will be no order as to costs.

R.S. ----- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:-*K.Venkataswami, J.*

*S.A.No.745/1979. 11*th June*, 1984.

Gopalakrishnan *Appellant**

v.

M.A.V. Veerappa Chettiar (Died) and others *Respondents.*

Provincial Insolvency Act (V of 1920), section 43 - Order of annulment passed - Order regarding vesting of properties in the Official Receiver passed subsequently - Effect of that order.

Held:- It is seen from the records that the order of annulment was passed under section 43 of the Provincial Insolvency Act on the failure on the part of the insolvent to apply for discharge. Though it is expected of the insolvency Court to pass simultaneously an order regarding vesting of properties in the Official Receiver, if necessary, along with the order of annulment under section 37, that does not mean that the Court is powerless to rectify the mistake by passing an order subsequently vesting the properties in the Official Receiver to protect the interests of the creditors. *[Para.9]*

Cases referred to:-

Choutmal v. Jokhi Ram, A.I.R. 1933 Pat.84; *Ishar Das v. Mt.Fatima Bibi,* A.I.R.1934 Lahore.468; *Abdul Latif v. J.R.Percival,* A.I.R.1936 Cal.573; *Baluswamy v. Official Receiver, Madura,* (1938)1 M.L.J.824: A.I.R.1938 Mad.752; *Veerayya v. Kotireddi,* (1941)1 M.L.J. 537: A.I.R.1941 Mad.588; *Subbiah Goundan v. Ramaswami Goundan,* (1953)2 M.L.J.766: I.L.R. (1954) Mad.80: A.I.R.1954 Mad.604; *Sarjubai v. Co-operative Society, Nanpa,* A.I.R.1949 Nag.39.

Appeal against the Decree of the District Court, Pudukottai dated 21-10-78 and passed in Appeal Suit No.169/1977 preferred against the decree of the Court of the District Munsif of Pudukottai in Original Suit No.579/ 1970.

I.Mahaboob Sheriff, for Appellant.

T.R.Rajagopalan, for Respondents.

The Court delivered the following

JUDGMENT:- The second defendant in O.S.No.579 of 1970 on the file of the Court of the District Munsif, Pudukottai, is the appellant. The first respondent, who died pending disposal of the second appeal, was the plaintiff. The suit filed by him was for partition by metes and bounds and separate possession of his one-half share in the suit property with mesne profits.

2. The brief facts relating to the suit are as follows. Originally the suit property belonged to one Krishnaswami Chettiar and others. Subsequently, one S.R.Ramaswami Chettiar, son of Krishnaswami Chettiar, and his agnate Nagaratnam Ammal became the owners of the suit properties, the former having two-third share and the latter one-third share. In I.P.No.6 of 1956, Sub Court, Pudukottai, the said Ramaswami Chettiar was adjudged as an insolvent by an order dated 12-9-56 and all the properties including the mortgaged property vested with the Official Receiver, Tiruchirapalli. In the course of the administration of the estate of Ramaswami Chettiar, the Official Receiver sold one-third share mortgaged to the plaintiff subject to mortgage on 29-1-1966 and pursuant to the sale and after confirmation, a sale certificate was also issued to the plaintiff on 16-6-1969. On 17-9-1969 the plaintiff obtained symbolical delivery of the one-third share through E.A.No.146 of 1969 in I.P.No.6 of 1956. All steps taken by the plaintiff to get separate possession of the property purchased by him by negotiations proved futile by reason of non-co-operation of the defendants, who are the legal representatives of the deceased Ramaswami Chettiar. Therefore, the plaintiff was obliged to file the suit for partition and separate possession of his share in the suit property.

3. Defendants 1 and 2 are the sons, third defendant is the wife and fourth defendant is the daughter of the deceased Ramaswami Chettiar. The suit was resisted *inter alia* contending that the sale by the Official Receiver and all the subsequent proceedings pursuant to the sale are totally unsustainable in law, and, therefore, the plaintiff derived no title to the suit property. The basis for the above contention is that the adjudication was subsequently annulled under section 43 of the Act by the Insolvency Court on 10-7-62 and while making such an order of annulment the Court failed to make an order regarding the continued vesting of the property for the benefit of the creditors with the Official Receiver. The order dated 2-8-62 of the court revesting the properties is without jurisdiction. The failure to make a simultaneous order to continue the vesting with the Official Receiver had resulted in automatic vesting of the properties with the insolvent and, therefore, the subsequent sale by the Official Receiver will have no effect at all.

4. The trial Court, on a consideration of the pleadings, arguments and the relevant documents, came to the conclusion that the sale by the Official Receiver was true, valid and binding on the defendants and that the Official Receiver had power to sell the suit property. Consequent to the said findings the suit was decreed as prayed for.

5. The second defendant felt aggrieved by the judgment and decree of the trial Court and filed A.S.No.169 of 1977 on the file of the Court of the District Judge of Pudukottai. Before the Lower Appellate Court, the same arguments were pressed into service and the Appellate Court, in its considered judgment, over-ruled the same and consequently confirmed the judgment and decree of the trial Court. It is under these circumstances, the second defendant has filed the present second appeal against the concurrent judgments and decrees of the Courts below.

6. The substantial question of law that was framed at the time of admission of the second appeal is as follows:-

> "Whether the Courts below committed any illegality in ignoring the annulment order dated 10-7-62 and in upholding subsequently the vesting order dated 2-8-1962 and on other grounds stated in paragraph 12 of the grounds of appeal."

7. Mr.I.Mahboob Sheriff, learned counsel appearing for the appellant, contended that the subsequent order of vesting by the Insolvency Court will not help the plaintiff to sustain the sale by the Official Receiver and, therefore, the sale as well as all further proceed-

ings must be deemed to be non-est in law. It is the contention of the learned counsel that while passing the annulment order on 10-7-1962, the Insolvency Court failed to make simultaneously an order vesting the properties in the Official Receiver. and the subsequent vesting order dated 2-8-1962 vesting the properties in the Official Receiver with retrospective effect is not sustainable in law.

8. Mr.T.R.Rajagopalan, learned counsel appearing for the plaintiff first respondent (now represented by respondents 5 to 8 who are brought on record as legal representatives on 3-9-1982), contended that after the order of annulment, the insolvency proceedings will not automatically come to an end if by oversight the Court omitted to pass necessary orders for the protection of the creditors, there is nothing in the Insolvency Act disabling the Court to pass an order subsequently to correct the mistake to protect the interests of the creditors. It is the contention of the learned counsel for the contending respondents that the Courts below are perfectly right in decreeing the suit for partition.

9. It is seen from the records that the order of annulment was passed under section 43 of the Provincial Insolvency Act on the failure on the part of the insolvent to apply for discharge. Though it is expected of the Insolvency Court to pass simultaneously an order regarding vesting of properties in the Official Receiver, if necessary, along with the order of annulment under section 37, that does not mean that the Court is powerless to rectify the mistake by passing an order subsequently vesting the properties in the Official Receiver to protect the interests of the creditors. Mr.I.R.Rajagopalan relied on the following reported judgments in support of his contention; *CHOUTMAL v. JOKHI RAM*, A.I.R.1933 Pat.84, *ISHAR DAS v. MT.FATIMA BIBI*, A.I.R. 1934 Lahore 468; *ABDUL LATIF v. J.R.PERCIVAL*, A.I.R. 1936 Cal.573, *BALUSWAMY v. OFFICIAL RECEIVER, MADURAI*, (1938)1 M.L.J.824= A.I.R.1938 Mad.752 and *VEERAYYA v. KOTIREDDY*, (1941)1 M.L.J.537= A.I.R.1941 Mad.583. It may be mentioned here that in the decision in *BALUSWAMI v. OFFICIAL RECEIVER, MADURA*, (1938)1 M.L.J.824= A.I.R.1938 Mad.752 Pandrang Row, J. after referring with approval to the earlier three judgments referred to above, has taken the view that the order, vesting the properties in the Official Receiver even if passed subsequent to the order of annulment, is valid and the same cannot be challenged because it was not passed simultaneously with the order of annulment but some time later.

10. In *ISHAR DAS v. MT.FATIMA BIBI*, A.I.R.1934 Lahore 468 it was held as follows:

> "If a debtor fails to apply for an order of discharge within the period specified by the Court, or having made such application fails to appear on the date of hearing, the adjudication does not stand cancelled automatically but the Court must make an express order annulling the order of adjudication.
>
> Where an Insolvency Court while passing an order under section 43 annulling adjudication has omitted to pass an order under section 37 directing that the property of the insolvent shall vest in the Official Receiver for the benefit of the general body of creditors, it has the power to add it at a later stage. An Insolvency Judge possesses the inherent powers of a civil Court, to make all orders necessary for the ends of justice and prevent abuse of the process of Court."

Similar was the view taken by the Patna High Court and the Calcutta High Court, reference to which had already been made. The principle laid down in *BALUSWAMI v. OFFICIAL RECEIVER, MADURA*, (1938)1 M.L.J.824; A.I.R.1938 Mad.752 has subsequently been followed in *CHIDELTA VEERAYYA v. KALLAM KOTIREDDI*, (1941)1 M.L.J.537: A.I.R.1941 Mad.588.

11. In *CHOUTMAL v. JOKHI RAM*, A.I.R.1933 Patna 84 a Division Bench of that High Court at page 86 has observed as follows:-

"In this particular case an order vesting the property in the receiver was passed on 1st August 1928, about six weeks after the order of annulment. The question is - Is this order valid and operative? If so, the insolvency proceeding has not come to an end, though the protection afforded to the debtor has been taken away from him. Sir Sultan Ahmad has contended, as I have said that the order contemplated in the last clause of section 37 must be passed simultaneously with the order of annulment, and, if it is not done, the court is deprived of its powers and no subsequent vesting order can be of any avail. I cannot accept it, and see no reason why the order cannot be passed later on. To hold otherwise will lead to serious injustice, as it would have done in this case, and this the legislature could never have contemplated. It is to be noted that in the case before us the order of adjudication was made on appeal by this Court at the instance of one of the creditors (appellant in Miscessaneous Appeal No.210 of 1930) and the annulment was made on account of the default of the insolvent behind the back of the creditors, who were vitally interested in the administration of the insolvent's estate.

The order of annulment, on failure to apply for discharge, is intended to punish the insolvent by withdrawing from him the protection which he gets by the order of adjudication and if, while passing the order of annulment the Court by some eversight or other fails to pass orders for the protection of the creditors, there is no reason why the Court cannot do so when the mistake is pointed out to it. There is nothing in the Insolvency Act to prevent it. It is not correct to say that after the order of annulment the insolvency proceeding comes to an end *ipso facto*. This very section 37 provides that all the previous acts of sale or disposition of property etc. will hold good. Cases may arise in which the direction and orders of the Court may be necessary for the purpose of court acts to complete the titles of the transferees, etc. or for protecting their interest and there is no reason to hold that the Court after the order of annulment ceases to have jurisdiction in the insolvent's estate. The cases which I have referred above and on which reliance has been placed on behalf of the respondents are of no use, to us. In none of these cases was any order vesting the property in any other person passed by the Bankruptcy Court, even on a subsequent date, and therefore the legal consequences followed and the property was held to be vested in the insolvent. None of these cases can be an authority for the proposition that the order contemplated in the last clause of section 37 cannot be passed some time after the order of annulment."

In *ABDUL LATIF V. J.R.PERCIVAL*, A.I.R. 1936 Cal.573 a learned single Judge of that High Court following the decision *CHOUTHMAL v. JOKHI RAM*, A.I.R. 1933 Patna 84 has held as follows:

"The vesting of the property in a person appointed by the Court as provided in section 37 of the Act is designed to carry this object into effect. Section 37 merely states the effect of an annulment and an adjudication can be annulled under a variety of circumstances which I have indicated above. The insolvency proceedings do not automatically terminate with the annulment, and it cannot be said that by an order passed under section 43 of the Act the Judge loses seisin of the matter and cannot thereafter make any order in those proceedings"

12. In view of these clear pronouncements there can be little doubt that the Courts below are right in decreeing

the suit, negativing the technical plea raised by the defendants.

13. Mr.Mahaboob Sheriff, however, relied on a Full Bench decision of this Court, reported in *SUBBIAH GOUNDAN v. RAMASWAMI GOUNDAN*, (1953)2 M.L.J.766= A.I.R.1954 Mad.604= I.L.R. (1954) Mad.80. On a perusal of the judgment, it is clear that the point that directly arises in this case was not the point for consideration in the said Full Bench case. The learned counsel wanted to rely on the following observations in the Full Bench Judgment.

> "Once the adjudication was annulled without imposing any conditions, it must be taken that there was no insolvency at all, and by reverter under section 37 of the Provincial Insolvency Act, the prior state of things was restored and the property vested in the insolvent with retrospective effect. The effect of annulling the insolvency was to wipe out the effects of insolvecy altogether and to vest the property in the insolvent debtor, subject however to the exceptions provided in section 37."

The learned counsel contended that applying the above principle to the facts of the instant case, it must be held that the order of annulment had the effect of restoring the properties in the insolvent with retrospective effect and subsequent order of the Insolvency Court, vesting the properties in the Official Receiver with retrospective effect, has no legal sanction. I am unable to agree with the contention of the learned counsel for the appellant. As pointed out earlier, on the facts, the Full Bench had no occasion to consider whether the Insolvency Court can pass an order subsequent to the annulment to safeguard the interests of the creditors, vesting the properties in the Official Receiver and, therefore, the said observations cannot be pressed into service to sustain the argument, particularly in the light of the other judgments of this Court as well as other Courts to the effect that there can be an order of vesting the properties in the Official Receiver subsequent to the order of annulment to protect the interests of creditors. The reasons for taking such a view had been given in the decisions to which reference had already been made.

14. Mr.Mahaboob Sheriff also relied on the judgment, reported in *SARJUBAI v. CO-OPERATIVE SOCIETY, NANPA*, A.I.R. 1949 Nagpur 39. Though this judgment appears to support the contention of the learned counsel for the appellant, in view of the fact that a different view, has been taken in other cases it is not possible for me to accept the view taken in *SARJUBAI v. CO-OPERATIVE SOCIETY, NANPA*, A.I.R.1949 Nagpur 39.

15. No other point was raised and argued, in the light of the above discussions, I am of the view that the judgments and decrees of the Courts below are perfectly in accordance with the principles laid down by this Court and do not call for any interference in this second appeal. Consequently, the second appeal fails and it is dismissed. However, there will be no order as to costs.

R.S. ----- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

Present:- *G.Ramanujam, J.*

*W.P.No.2293 of 1984. *9th August, 1984.*

S.Swaminathan *Petitioner**

v.

State of Tamil Nadu, represented by the Commissioner and Secretary, Home Department, Fort St. George, Madras-9 and others *Respondents.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 3(A)(3) - Scope - The Tamil Nadu Buildings (Lease and Rent Control) Rules (1974) - "Any Person" - Meaning of - Allottee of a building requisitioned by Government - Held to be a person aggrieved.

The words 'any person' aggrieved by an order under sub-section (2) of section 3-A(3) of the Tamil Nadu Buildings (Lease and Rent Control) Act will take in, in the case of orders directing the release of a building, the allottee who is factually aggrieved by the order of release.

In the case of an application for release of a building under section 3(A) of the Act, the Government who is actually the statutory tenant cannot be a party for the Government itself has been constituted as an appellate authority under the rules. Therefore, the only party who can resist an application under section 3-A can only be the allottee, though the allottee claims his right only through the Government. An order passed under section 3-A(2) may be positive or negative, that is an order may be one releasing the building or it may be a refusal to release the building. If every order passed under section 30-A(2) should be the subject-matter of an appeal, then in respect of an order directing the release of the building, the appeal could be filed only by the allottee and not by the Government which is the statutory tenant and which also happens to be the appellate authority under the Act. Rule 20 says that in cases falling under section 3, 3-A and 12 of the Act, the authorised officer, if he thinks fit to do so, may personally inspect the building concerned and may call for any particulars in respect of the said building from the landlord or tenant or occupant or any previous tenant or occupant thereof and such landlord, tenant or occupant shall thereupon furnish such particulars. Thus at the time of the inspection, the allottee as a person in occupation of the premises is entitled to appear and make representation. Thus, section 3-A and the Rules referred to above as amended appear to proceed on the basis that even though the Government is the statutory tenant and the allottee is merely a licence in occupation of the premises, he has a right of representation before the Accommodation Controller while deciding the question as to whether the building is to be released or not and he is also authorised to file an appeal if the order of release is made overlooking his representations. *[Paras.4 & 6]*

Cases referred to:-

Durai v. Govt. of Tamil Nadu, (1976)89 L.W.558; *Kandan v. The Chairman, Madras Dock Labour Board, Madras,* (1983) 96 L.W.68; *Balmukand Sharma v. Board of Revenue,* I.L.R. (1966)16 Raj.1091.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a Writ of *Certiorari* calling for the records in G.O.Ms.No.365 Home [illegible] Department on the file of the 1st respondent herein and quash the order dated 15-2-1984.

N.Sivamani, for P.S.Somasundaram, for Petitioner.

M.A.Sadanand and K.Sampath, for Respondents.

The Court made the following

ORDER:- The petitioner herein is a Central Government servant working in the postal department and he was allotted Premises No.41, Royapettah High Road by the Government on a monthly rent of Rs.55/-. The said premises was earlier requisitioned by the Government. The owner of the premises applied for release of the said premises on the ground that he required the premises *bona fide* for his own occupation. Though similar requests from the owner had been rejected on earlier occasions, the Accommodation Controller has chosen to direct the release of the building by an order dated 1-7-1982. In pursuance of the said order releasing the building at the instance of the owner, the petitioner who was an allottee was directed to deliver possession of the building under threat of a forcible eviction by an order dated 2-6-1983. The said order was received by the petitioner on 7-6-1983 and the petitioner thereafter filed an appeal to the first respondent herein, the State Government, on 20-7-1983. The Government had chosen to entertain that appeal and has disposed of the same on merits holding that the owner of the building has established his *bona fide* requirement for his own occupation and in that view dismissed the appeal filed by the petitioner. Aggrieved by the order of dismissal of his appeal, the petitioner has filed the present writ petition for quashing the order of the Government made in G.O.Ms.No.365 Home dated 15-2-1984. Apart from questioning the order of the Government on merits, the petitioner has also raised a ground that in so far as the Accommodation Controller did not fix any specified date for hearing and give notice of the same to the parties before him, the ultimate order passed by him stands vitiated for not following the procedure set out in Rules 11 and 12 of the Tamil Nadu Buildings (Lease and Rent Control) Rules, 1974.

2. When the Writ Petition was taken up for hearing, the learned Additional Government Pleader appearing for the first and the second respondents and the counsel appearing for the third respondent, the owner of the premises, have raised an objection as to the maintainability of the writ petition and their objections are two-fold. One is that as the petitioner being only a licensee and as his rights flow only from the Government who had directed the release of the building and as he has no independent right in relation to the subject-matter he cannot maintain this writ petition against the orders of the Government. The second is that even assuming that the writ petition is maintainable, the petitioner is not entitled to succeed therein as his appeal before the Government was admittedly time barred and as such the Government should not have entertained the appeal and disposed of the same on merits.

3. In support of the first contention, reference is made to the decision of Sathiadev, J. in *VISWANATHAN v. THE COLLECTOR OF MADRAS*, (Writ Petition No.9559 of 1982) and the decision of Mohan, J. in *DURAI v. GOVERNMENT OF TAMIL NADU*, (1976) 89 Law Weekly 558. In the first case it has been held that since the writ petitioner is only a licensee under the Government which is legally the tenant of the premises, he cannot claim the status of a tenant under the Act and, therefore, he is not entitled to challenge an order passed by the Government directing the release of the building and the petitioner as an allottee is bound by the action of the Government and he cannot claim any independent right apart from his position as an allottee. In the second case, a house requisitioned by the Government under section 3(3) was later released at the instance of the owner of the building. That order directing the release passed by the Government was challenged by the allottee of the premises on the ground that he was not given any notice before the order of release was passed and, therefore, the order releasing the building is vitiated. Mohan, J. while dismissing the writ petition pointed out that the order directing the release of the

building amounts to a revocation of the licence granted in favour of the allottee, the writ petitioner, and as such he is not entitled to any notice. The learned Judge also proceeded on the basis that it is the government which is the statutory tenent and the allotee is only a licensee from the Government and he has no independent right to agitate as against the Government. After a due consideration of the above two decisions relied on by the learned counsel for the respondents, I am of the view that those decisions do not apply to the facts of this case. Further the said decisions do not make any reference to the changes brought about in the statutory provisions by the amendment in the year 1973.

4. Before the amendment in 1973, an allottee of the premises requisitioned by the government was treated as a mere licensee with no right of his own except the right he can claim through the Government and if the Government chooses to release the building it has earlier requisitioned, the allottee has no say in the matter. But the position has been somewhat changed by the amendement brought in the year 1973. Section 3-A(3) is to be noted in this connection. Section 3-A deals with the topic of release of the building. Section 3-A(1)(a) enables the owner of a residential building which has been requisitioned by the Government to apply for release on the ground that he requires it for his own occupation or for the occupation of any member of his family subject to the condition that the landlord or the member of the family subject to the condition that the landlord or the member of the family is not occupying any residential building of his own in the city, town or village concerned. Section 3-A(3) which is relevant is as follows:-

"Any person who is aggrieved by an order passed by the authorised Officer under sub-section (2) may, within fifteen days from the date of receipt of such order, prefer an appeal to the Government and the Government shall pass such order as they deem fit and on such appeal being preferred, the Government may order stay of further proceedings in the matter pending decision on the appeal."

The above sub-section (3) uses the expression "any person" who is aggrieved by an order passed under sub-section (2) releasing the building. If really the only person who can be taken to be aggrieved is the landlord, the statute would have used the word 'landlord' or 'the applicant for release' instead of the expression "any person". The Sub-section seems to proceed that there is more than one person who can be aggrieved by an order passed by the Government releasing the building. The other sub-sections to section 3-A wherever the context requires, use the expression 'landlord'. Therefore, the Legislature should have used the expression 'landlord' in sub-section (3) if the landlord is the only person who is taken to be aggrieved by the order of the controller. Sub-section (2) contemplates two kinds of orders passed by the concerned authorities, one an order releasing the building and the other rejecting the application for release. Sub-section (3) is in general terms comprehending both the kinds of orders. It is only in respect of a rejection of an application for release the landlord may be said to be aggrieved. In respect of an order directing a release, the landlord cannot be said to be an aggrieved person, but the allottee can be taken to be aggrieved. Thus the language of sub-section (3) which uses the expression "any person aggrieved by an order under sub-section (2)" will take in, in the case of orders directing the release of the building, the allottee who is factually aggrieved by the order of release.

5. In this connection, a look at the relevant rules is also necessary. Rule 11 *inter alia* says that every application for release under section 3-A shall also state the grounds on which the application is made and sub-rule (2) of Rule 11 says that every application under the Act shall be accompanied by

a spare copy or sufficient number of spare copies thereof for service on the respondent or respondents mentioned therein. Rule 12 deals with the procedure for disposal of applications, and that states that when an application is presented under Rule 11, the Controller or the authorised officer, or an officer authorised by him, as the case may be, shall fix the date on which and the place at which the inquiry in respect of the application will be held and send notice thereof to the applicant or applicants and the respondent or respondents mentioned in the application and also send a copy of the application along with the notice to the respondent or respondents. Sub-rule (2) of Rule 12 directs the Controller or the authorised officer to give the parties a reasonable opportunity to state their case. He shall also record a brief note of the evidence of the parties and witnesses, if any, examined on either side. Thus a conjoint reading of Rules 11 and 12 shows that they apply not only to the applications under section 10 but also to the applications filed under section 3-A for release of the building and that there are two rival parties even in an application for release under Section 3-A(1). In the case of an application for release of a building filed under Section 3-A, the Government who is actually the statutory tenant cannot be a party for the Government itself has been constituted as an appellate authority under the Rules. Therefore, the only party who can resist an application under section 3-A can only be the allottee, though the allottee claims his right only through the Government. Rule 18 provides for appeals being filed to the Government against the orders of the Accommodation Controller releasing or refusing to release the building. As already stated, an order passed under section 3-A(2) may be positive or negative, that is an order may be one releasing the building or it may be a refusal to release the building. If every order passed under Section 3-A(2) should be the subject-matter of an appeal, then in respect of an order directing the release of the building, the appeal could be filed only by the allottee and not by the Government which is the statutory tenant and which also happens to be the appellate authority under the Act. Rule 20 makes the position still clearer. That rule deals with inspection of the building by the authorised officer. That says that in cases falling under section 3, 3-A and 12 of the Act, the authorised officer, if he thinks fit to do so, may personally inspect the building concerned and may call for any particulars in respect of the said building from the landlord or tenant or occupant or any previous tenant or occupant thereof and such landlord, tenant or occupant shall thereupon furnish such particulars. Thus at the time of the inspection, the allottee as a person in occupation of the premises is entitled to appear and make representations.

6. Thus section 3-A and the Rules referred to above as amended appear to proceed on the basis that even though the Government is the statutory tenant and the allottee is merely a licensee in occupation of the premises, he has a right of representation before the Accommodation Controller while deciding the question as to whether the building is to be released or not and he is also authorised to file an appeal if the order of release is made overlooking his representations. In this case, it is only under Rule 18, the petitioner has filed an appeal before the government. As an occupant, the petitioner is aggrieved by the order passed by the Accommodation Controller under section 3-A(2) and as an aggrieved person he is entitled to file an appeal under that Section read with Rule 18 to the Government. Having regard to the fact that the statute gives certain special rights, that is, right of representation, right to file an appeal to the Government etc. the petitioner as an occupant of the premises which has since been directed to be released by the respondents 1 and 2 and who is aggrieved by the decision of the government rejecting his appeal is entitled to come before this Court as against the rejection of his appeal.

7. Irrespective of the fact whether the petitioner is entitled to file an appeal before the Government as a party to the proceeding, the question to be considered now is whether the petitioner whose appeal has been rejected by the Government can come before this Court as an aggrieved party or not. If a person files an appeal before the Government and that appeal is rejected, no reasoning is necessary to show that he is an aggrieved person by the rejection of his appeal by the Government. Such a person can maintain a writ petition before this Court. In such a case he is not coming before this Court as a mere allottee but as a person whose appeal has been rejected by the Government. In this view of the matter, I am not inclined to uphold the objection taken by the learned counsel for the respondents that the petitioner cannot maintain the writ petition before this Court. The special facts that arise in this case were not present in the cases decided by Sathiadev, J. and Mohan, J. referred to above. Hence those decisions do not stand in the way of the petitioner maintaining the writ petition.

8. The further question is whether the appeal has rightly been entertained by the Government. According to the learned counsel for the respondents, an appeal against an order of the Accommodation Controller passed under section 3-A (2) can be filed within 15 days from the date of the receipt of the order and in this case the appeal before the Government having been filed beyond the said period of 15 days, the Government should have rejected the appeal without going into the merits. It is not in dispute that the Accommodation Controller passed an order directing the petitioner to hand over possession of the premises on 2-6-1983 and that was received by the petitioner on 7-6-1983. As per the provisions of the Act, the appeal has to be filed in this case on 20-7-1963. In the memorandum of grounds of appeal, the petitioner has admitted that the appeal is being filed beyond time but he has given certain explanation as to why the appeal could not be filed in time. Though the memorandum of appeal contained a prayer by the petitioner that the delay in filing the appeal should be condoned and the appeal should be dealt with on merits after such condonation, the impugned order of the Government straightaway proceeds to deal with the appeal on merits without referring to the question of delay. It is in those circumstances, the learned counsel for the respondents have taken up the plea that the Government could not have entertained the appeal filed belatedly and it should have rejected the appeal as having been filed out of time. The learned counsel for the petitioner does not dispute the fact that the appeal has been filed before the Government beyond the time but what he contends is that since the Government has disposed of the appeal on merits it should be presumed that the Government has condoned the delay and that the mere fact that the Government has not chosen to pass any order regarding the question of delay will not invalidate the Government's order dealing with the merits of the case. In support of this plea, Mr.Sivamani, the learned counsel for the petitioner refers to the following two decisions: (1) *KANDAN v. THE CHAIRMAN, MADRAS DOCK LABOUR BOARD, MADRAS* (1983) 96 L.W.68; *BALMUKAND SHARMA v. BOARD OF REVENUE*, (1966) I.L.R.16 Rajasthan 1091.

9. In the first case, the Court was concerned with an order of rejection of an appeal passed by a Secretary of the Dock Labour Board. This court held that the power to condone the delay vests with the Chairman of the Dock Labour Board under the Madras Dock Workers' (Regulation of Employment) Scheme, 1956 and in that case, since the Chairman had not exercised his discretion in the matter of condonation of the delay but the Secretary exercised his discretion and rejected the appeal, the order rejecting the appeal was quashed and the matter was directed to be considered by the Chairman. I do not see how that decision will

be of any help to the petitioner herein. In the second case, the Rajasthan High Court was dealing with a case where the appellate authority had entertained the appeal without making a specific order on the question of delay. But on the facts of that case, the Court drew an inference that the appellate authority condoned the delay even though it did not pass any specific order to that effect and proceeded to dispose of the appeal on merits. Relying on that decision, Mr.Sivamani wants this Court to draw the inference that the first respondent in this case had in fact condoned the delay before proceeding to deal with the appeal on merits. A perusal of the Judgment of the Rajasthan High Court indicates that the appellate authority was in fact aware of the fact that the appeal had been filed belatedly but none-the less chose to dispose of the appeal on merits. Thus the special facts of that case, were sufficient to draw the inference that the appellate authority proceeded to deal with the merits after condonation of the delay, though no specific order was passed to that effect. But in this case it is not possible to say that the Government was aware of the fact while disposing of the appeal on merits, that the appeal had not been filed in time. As a matter of fact, the rules provide that the memorandum of appeal filed before the Government must contain the date of receipt of the order appealed against and a copy of the order appealed against should be appended to the memorandum of grounds of appeal. According to the learned Government Pleader these steps have not been taken by the petitioner and therefore the Government would not have been aware of the fact that there has been a delay in filing the appeal. The learned counsel for the petitioner, however, refers to the last paragraph in the memorandum of grounds of appeal wherein the petitioner has stated the reasons for the delay in filing the appeal. It is no doubt true that the memorandum of grounds of appeal contains the reasons for the delay and the request for condonation of the delay, but it is not clear whether while disposing the appeal the Government was really aware of the fact that there is a delay in filing the appeal from the file produced. Therefore unless one is in a position to say that the Government was aware of the delay in filing the appeal while disposing of the appeal it is not possible to draw an inference that the Government has chosen to condone the delay and only thereafter it has proceeded to dispose of the appeal on merits. I am not therefore inclined to accept the contention of the learned counsel for the petitioner that the Government should be deemed to have condoned the delay while disposing of the appeal on merits.

10. It cannot be disputed that the Government as an appellate authority can dispose of the appeal on merits only when there is a proper appeal before it. If the appeal has been filed belatedly, unless the delay in filing the appeal is condoned, the appellate authority is not entitled to entertain the appeal and deal with the appeal on merits. Since the Government, in this case, has not chosen to deal with the question of delay and straightaway proceeded to deal with the appeal on merits without going into the question as to whether the appeal has been properly filed or not, the impugned order of the Government disposing of the appeal on its merits cannot legally be sustained. The result of allowing the petition is to restore the appeal filed by the petitioner before the Government and the said appeal has to be disposed of now by the Government. However, before going to deal with the appeal on merits, the Government has to give a finding whether a case has been made out for the condonation of the delay or not. If the Government finds that this is a case for the condonation of the delay, then it will have to necessarily give notice to the third respondent, the owner of the building and hear his objections before passing a final order. When the Government considers the question whether the delay in filing the appeal is to

be condoned or not, the owner of the building will be given notice and he will be heard on all objections taken by him. The objections may also include as to whether section 5 of the Limitation Act applies and whether there are sufficient grounds for the condonation of the delay.

The Writ Petition is allowed accordingly. There will be no order as to costs.

R.S. ------ *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *V.Ramaswami, J.*

*S.A.No.1881 of 1981. *8th February,* 1985.

B.Beekamchand Sowcar *Appellant**

v.

M.Jayaraman *Respondent.*

(A) Tamil Nadu Pawn Brokers Act (XXIII of 1943), sections 11(1) and (2) and 12 - Pawn Broker - Suit for return of articles - Defendant opposing alleging that right to redeem had been lost and article had been sold - Burden of proof lies on pawn broker.

(B) Tamil Nadu Court - Fees and Suits Valuation Act (XIV of 1955), sections 12(2) and 4(a) - Valuation of the suit and the Court - Fee paid by the plaintiff not disputed by the defendant - Effect of.

(C) Civil Procedure Code (V of 1908), section 102 - Value of the suit less than Rs.700 - Second Appeal - Whether maintainable.

It may be seen from section 11 of the Tamil Nadu Pawn Brokers Act which deals with the rights of both the pawner and the pawn-broker, that in so far as the pawner is concerned, he is entitled to redeem the pledged articles by payment of the amount due at any time until the pawned articles are disposed of, as provided for in the Act. So far as the pawn-broker is concerned, he is not entitled to dispose of the pledged articles for a period of one year and seven days and thereafter an option is vested in the pawn-broker either to have the article disposed of and recover the amount lent or wait till the article is redeemed. This is the effect of section 11, Clause (1) of section 11, by providing that every pledge shall be redeemable within one year from the date of pawning and seven grace days thereafter, places a restriction on the pawn-broker selling the property and realising the amount, before that period of one year and seven days. The right under clause (1) of section 11 vested in the pawner is in no way different from the one, which is made under clause (2) of section 11. Both the rights are, a right to redeem only the articles which are not disposed of. It is put in the negative form in section 11(1) restricting the right of the pawn-broker in respect of the disposal of the articles and recovering the amount lent on the pledge. In the circumstances there could be no doubt that the burden of proving that the article is disposed of is on the pawn-broker because it is not as if the pawn-broker is obliged to sell as soon as the period of one year and seven days is over. An option is vested in him to dispose of it or wait for the redemption. Therefore the pawn-broker will have to establish that he had exercised his option and disposed it of. Even otherwise, proving the negative of non-disposal of the article, cannot be said to rest on the plaintiff even under the provisions of the Evidence

Act. The burden is therefore on the defendant to prove that he had exercised his option and disposed of the said articles and therefore the plaintiff has no right of redemption. Section 12(1) says that a pledge passed shall not be disposed of by the pawn-broker otherwise than by sale at a public auction conducted in accordance with such rules as may be prescribed. The rules prescribed state that the pawn-broker in the City of Madras shall apply to the Commissioner of Police for permission for sale of time-barred jewels with a list, in triplicate of jewels, etc, Rule 12 also provides for mode of selling the articles.
[Paras.2 and 3]

Under clause (2) of section 12 of the Court-fees Act, the defendant is entitled to plead that the subject-matter of the suit had not been properly valued or that the court-fee paid is not sufficient. If such a question is raised, the Court is bound to make an order after hearing the parties. It is well established that unless the plea raised by the defendant on the value of the suit would affect the jurisdiction of the Court to deal with the subject-matter of the suit the value determined and the court-fee payable could not be questioned by the defendant in appeal or revision against the order of the trial Court. However in such cases where jurisdiction is not involved, if the decree is ultimately against the defendant and appeal is preferred by him against that judgment, it is open to him to raise the question of court-fee or the valuation, in the appeal that may be preferred, under section 12(4)(a) of the Court-fees Act, because the order made by the trial Court on the question of valuation will not operate as *res judicata* and it will form part of the judgment, which was made in the suit itself. However, if the defendant had not raised the question of valuation originally it is not open to him to raise that question, even when it comes up on appeal. It may be seen from the provisions contained in section 12(4)(a) of the Court-fees Act, the appellate Court is entitled to consider the correctness of any order passed by the lower Court affecting the fee payable, there is no question of the appellate Court questioning the correctness of that order.
[Para.5]

In this case the defendant did not raise the question of valuation of the suit or the Court - fee payable in the trial Court itself and therefore, it will not be possible for him to question the same in second appeal. In fact he had not questioned the same in the first appeal preferred by him, even though he was the appellant in the Court below, instead he had simply adopted the value given by plaintiff in the trial Court. In the circumstances therefore it is not open to the defendant to re-value the claim in the second appeal for the first time in his own way.
[Para.5]

Case referred to:-

Jodhai Ramdayal v. Bharat Sukhdi, A.I.R.1959 M.P.97.

M.Shama Das, for Appellant.

U.N.R.Rao, for Respondent.

The Court delivered the following

JUDGMENT:- The defendant is the appellant. The suit was filed by the respondent/plaintiff for a direction to the defendant to return the gold chain weighing 65 grams by receiving the sum of Rs.833/- due to the defendant in respect of the pledge of the said jewel and borrowing of a sum of Rs.700/- on 27.8.1966. There is no dispute that the said chain, weighing 65 grams, was pledged with the defendant for the borrowing of a sum of Rs.700/-. The defence was that the plaintiff's right to redeem the pledged article had been lost long ago and the defendant had sold the articles. Both the courts below have concurrently held that the defendant had not proved the sale of the pledged article as per the provisions of the Tamil Nadu Pawn Brokers Act, 1943 (hereinafter referred to as the Act) and that therefore, the plaintiff

is entitled to the decree as prayed for. In this Second Appeal, a preliminary objection was taken by the learned counsel for the respondent/plaintiff on the maintainability of the second appeal, in view of the provisions of section 102 of the Code of Civil Procedure, which I will deal with later on.

2. Learned Counsel for the appellant in this case contended that under the provisions of the Act and the Rules framed thereunder, and in particular section 11(2) and the procedure prescribed for auction, the burden is on the plaintiff to prove that the article is not sold, if he wants to seek redemption under the provisions of section 11(2) of the Act. Section 11 of the Act reads thus:-

> "11(1). Every pledge shall be redeemable within one year from the date of pawning, exclusive of that day; and there shall be added to that year of redemption seven days of grace within which every pledge shall continue to be redeemable.
>
> (2). A pledge shall further continue to be redeemable until it is disposed of as provided in this Act, although the period of redemption and days of grace have expired."
>
> (Explanation omitted)

It may be seen from this provision, which deals with the rights of both the pawner and the pawnbroker, that in so far as the pawner is concerned, he is entitled to redeem the pledged articles by payment of the amount at any time until the pawned articles are disposed of, as provided for in the Act. So far as the pawn-broker is concerned, he is not entitled to dispose of the pledged articles for a period of one year and seven days and thereafter an option is vested on the pawn-broker either to have the article disposed of and recover the amount lent or wait till the article is redeemed. This is the effect of section 11. Clause (1) of section 11, by providing that every pledge shall be redeemable within one year from the date of pawning and seven grace days thereafter, a restriction is put on the pawn-broker selling the property and realising the amount before that period of one year and seven days. The right under clause (1) of section 11 vested in the pawner, is in no way different from the one, which is made under clause (2) of section 11. Both the rights are, a right to redeem only the articles which are not disposed of. It is put in the negative form in section 11(1), restricting the right of the pawn-broker in respect of the disposal of the article and recovering the amount lent on the pledge. In these circumstances, therefore, there could be no doubt that the burden of proving that the articles had been disposed of is on the pawn-broker because it is not as if the pawn-broker was obliged to sell as soon as the period of one year and seven days is over. An option is vested in him to dispose it of or wait for the redemption. Therefore, the pawn-broker will have to establish that he had exercised his option and disposed it of. Even otherwise, proving the negative of nondisposal of the article, cannot be said to rest on the plaintiff even under the provisions of the Evidence Act. The burden is therefore on the defendant to prove that he had exercised his option and disposed of the said article and therefore, the plaintiff has lost his right of redeemption.

3. Learned Counsel for the defendant referred to the provisions of section 12 and the rules framed thereunder relating to the auction. Section 12(1) says that a pledge pawned shall not be disposed of by the pawn-broker otherwise than by sale at a public auction, conducted in accordance with such rules as may be prescribed. The rules prescribed state that the pawn-broker in the city of Madras shall apply to the Commissioner of Police for permission for sale of the time barred jewels with a list, in triplicate, of jewels, etc. Rule 12 also provides for the mode of

selling the articles. In particular, the learned counsel relied on the provision that the auction list should be published and the auctioneer is bound to send a printed catalogue to the pawner by registered post at least one week before the date fixed for the sale. All these provisions relating to the sale are referred to by the learned counsel to show that the pawner should have been aware of the sale and therefore, it is not necessary for the pawnbroker to prove the disposal and also in respect of his argument that the burden of proving that it had not been disposed of, is on the plaintiff. I am unable to see how this argument can be advanced at all in this case. If the case of the plaintiff that the pledged article had not been disposed of is to be accepted, it means the provisions of section 12(1) had not been invoked and there is no question of publication of the auction and sending of notice to the plaintiff at all. If really the defendant had taken action under section 12(1) read with the rules framed under the Act, it would have been easy for him to prove that fact by reference to some or other of the records or by such evidence as he may choose to satisfy the Court that there was a public auction in which the pledged article had been sold. The only evidence available in this case is the oral evidence of the defendant himself, which, both the courts below have concurrently rejected, as unbelievable and unacceptable. In the circumstances, therefore, the defendant could not contend either that the plaintiff is not liable to seek the redemption of the article or that he has discharged the burden of proving that the article had been disposed of. Therefore, even on merits, the second appeal is liable to be dismissed.

4. Learned counsel for the respondent/plaintiff, as already stated, took a preliminary objection as to the maintainability of the second appeal on the ground that the value of the suit as mentioned in the plaint was Rs.833/- and therefore, the value of the second appeal should also be the same and that therefore, under section 102, Code of Civil Procedure, the second appeal is not maintainable. Learned counsel for the defendant does not dispute that the suit is of a small cause nature and that is so in view of the decision of a Division Bench of Madhya Pradesh High Court reported in *JODHAI RAMDAYAL v. BHARAT SUKHDI*, A.I.R.1959 M.P.97. However, he contended that the real value of the suit is not Rs.833/-, but it is more than Rs.3,000/- and therefore, the second appeal is maintainable. I am unable to see how this contention also is open to the defendant. When the suit was valued at Rs.833/-, the defendant did not dispute the value. If the case of the defendant is that since the suit has been decreed to the effect that the plaintiff is liable to pay Rs.700/- with interest at 12% p.a. from the date of pledge till the date of redemption and therefore, he had valued the second appeal at Rs.700/- with interest at 12% p.a. from the date of pledge till the date of second appeal, I could understand the argument. But it is not possible for me to accept the argument that he will be entitled to revalue the suit for the purpose of the second appeal on the ground that 65 grams of gold, which is sought to be redeemed by payment of money, is more than Rs.3000/- now.

5. Learned counsel for the defendant contended that under the Tamil Nadu Court fees and Suits Valuation Act, 1955 (hereinafter referred to as the Court Fees Act), in a suit for redemption of jewels pledged, the court fee should be paid on the value of the jewels and not on the value of the amount due for redemption of the jewels. But it is not necessary for me to go into that question, because that point was not taken by the defendant in the trial court at the time when he filed the written statement. Under clause (2) of section 12 of the Court-fee Act, the defendant is entitled to plead that the subject-matter of the suit had not been properly valued or that the court fee paid is not sufficient. If such a question is raised, the Court is bound

to make an order after hearing the parties thereto. It is well established and there is also a decision of the Supreme Court on that question, that unless the plea/raised by the defendant on the value of the suit would affect the jurisdiction of the Court to deal with the subject-matter of the suit, the value determined and the court fee payable could not be questioned by the defendant in appeal or revision against the order of the trial court. However, in such cases, where the jurisdiction question is not involved, if the decree is ultimately against the defendant and appeal is preferred by him against that judgment, it is open to him to raise the question of court fee or the valuation, in the appeal that may be preferred, under section 12(4)(a) of the Court Fees Act, because the order made by the trial Court on the question of valuation will not operate as *res judicata* and it will form part of the judgment, which was made in the suit itself. However, if the defendant had not raised the question of valuation originally, it is not open to him to raise that question, even when it comes up on appeal. The learned counsel for the appellant relied on section 12(4)(a) of the Court Fees Act, which reads as follows:-

> "12(4)(a). Whenever a case comes up before a court of Appeal, it shall be lawful for the Court, either of its own motion or on the application of any of the parties, to consider the correctness of any order passed by the lower court affecting the fee payable on the plaint or in any other proceedings in the lower Court and determine the proper fee payable thereon."

It may be seen from the provisions extracted above, the appellate Court is entitled to 'consider the correctness of any order passed by the lower court affecting the fee payable'. If there was no order made by the Court below affecting the fee payable, there is no question of the appellant questioning the correctness of that order. In this case, as already stated, the defendant did not raise the question of valuation of the suit or the court fee payable in the trial court itself, and therefore, it will not be possible for him to question that in this second appeal. In fact, he had not questioned it even in the first appeal preferred by him, even though he was the appellant in the court below; instead, he had simply adopted the value given by plaintiff in the trial Court. In the circumstances, therefore, it is not open to the defendant to revalue the claim in the second appeal, for the first time, in his own way. As already stated, it is necessary for the defendant to have valued the appeal including the interest payable by the plaintiff. The borrowing of Rs.700/- is stated to be on 27.8.1966. The second appeal was filed on 7.9.1981. Therefore, the period is a little more than 15 years. Even treating it as 16 years, if the interest is calculated at 12% p.a. for the said sum of Rs.700/-, the total amount will not be more than Rs.3000/-. In the circumstances, the second appeal, as such, is not maintainable and the preliminary objection has to be sustained. Therefore, the second appeal is liable to be dismissed both on the ground of maintainability and on merits. Accordingly, the second appeal will stand dismissed. The plaintiff will be entitled to his costs. Counsel fee Rs.250/-.

R.S. ----- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *G.Maheswaran, J.*

*C.R.P.No.1927 of 1984. 18*th January*, 1985.

M.Mani *Petitioner**

v.

D.Ramalingam *Respondent.*

Tamil Nadu Buildings (Lease and Rent Control) Act (XVIII of 1960), section 10(3)(a)(i) - Expression "is not occupying a residential building of his own" - Meaning of - Held that the expression should be limited to the situation where the landlord is not occupying a residential building of which he is the sole owner thereof.

On the question whether the karta of a Hindu family ought to have applied for eviction of the tenant under section 10(3)(c) and not under section 10(3)(a)(i) of Tamil Nadu Act 18 of 1960,

Held:- The ownership contemplated under section 10(3)(a)(i) must be exclusive ownership. The expression "is not occupying a residential building of his own" should be limited to the situation where the landlord is not occupying a residential building of which he is the sole owner. The petition for eviction by the karta in the instant case is perfectly maintainable.

[Paras.8 and 9]

Cases referred to:-

Purushothama Chettiar v. Parasumal Sowcar, (1977) 90 L.W.47; *K.S.Shantilal v. E.Penny Biber*, (1980) T.L.N.J.286.

V.Ayyadurai, for *Muthukumaraswamy*, *V.Ramajagadeesan* and *Rajaji*, for Petitioner.

N.Sivamani, for Respondent.

The Court made the following

ORDER:- The tenant is the revision petitioner. The landlord applied to the Rent Controller under Section 10(3)(a)(i) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 18/1960 hereinafter referred to as the Act, for the eviction of the revision petitioner who was a tenant in respect of a portion in the ground floor in premises No.3, Oilmonger Street, Triplicane Madras-5, on a monthly rent of Rs.25/-, on the ground that he required that portion of the premises in question for the occupation of his undivided brother.

2. The tenant/revision petitioner raised mainly two contentions: (1) that the requirement of the landlord is not *bona fide* and (2) that the petition filed by respondent/landlord under section 10(3)(c) of the Act is not maintainable.

3. The Rent Controller found that the requirement of the landlord is *bona fide* and that the landlord was correct in applying under section 10(3)(a)(i) of the Act and accordingly allowed the petition of the landlord ordering eviction of the petitioner. The appellate court confirmed the order of the Rent Controller.

4. The two points raised now are the same as those raised before the courts below. In regard to the first point, viz. that the requirement is not *bona fide*, both the courts below have clearly held that the requirement is *bona fide*. It is pointed out that there was strained relationship between the landlord and his brother, Balasubramanian, that he wanted to be separate in food and residence, that on that account he even got transferred to Kancheepuram and that requirement of the landlord is *bona fide* since his brother has to be separately accommodated in the premises. On this aspect, the petitioner has nothing to say, but however, he would contend that an earlier petition filed by the landlord

for eviction was dismissed and therefore the landlord has filed this petition before the court as though he requires the premises for the occupation of his brother, which is not a *bona fide* requirement. It is admitted by the tenant/revision petitioner himself that the earlier petition was filed in the year 1979 and after that in the year 1982 the landlord has filed this present petition. Therefore, it is clear that the earlier petition for eviction on the ground of wilful default has nothing to do with the presnet application requiring the premises for the occupation of the landlord's brother.

5. The only point that now remains for consideration is whether the respondent/landlord ought to have applied under section 10(3)(c) of the Act and whether his application under section 10(3)(a)(i) of the Act is not maintainable. A perusal of the eviction petition shows that the petition-premises belongs to the respondent herein, his mother and his brother and that after the death of the respondent's father in 1965, the respondent has been looking after the family as the eldest male member and karta of the family. It is in that capacity, the respondent/landlord seeks eviction of the tenant/revision petitioner on the ground that he requires the premises for the occupation of his undivided brother.

6. Mr.V.Ayyadurai, learned counsel appearing for the petitioner, invited my attention to section 10(3)(a)(i) of the Act and contended that the landlord can apply under that section only if the landlord requires that residential building for his own occupation or for the occupation of any member of his family and if he or any member of his family is not occupying a residential building of his own and that as his brother now owns residence along with his brother, the landlord is precluded from applying under section 10(3)(a)(i) of the Act. The learned counsel for the petitioner to support his arguments points out to section 10(3)(c) of the Act, which says that a landlord who is occupying only a part of a building whether residential or non-residential, may apply, to the Controller for an order directing the tenant occupying the whole or any portion of the remaining part of the building to put the landlord in possession thereof, if he requires additional accommodation for residential purpose or for the purpose of a business which he is carrying on, as the case may be, and contends that the respondent ought to have filed the petition under that section.

7. The expression "is not occupying a residential building of his own" came to be considered in *PURUSHOTHAMA CHETTIAR v. PARASUMAL SOWCAR*, (1977) 90 L.W.47. That was a case where the tenant contended that the landlord had a right of residence in the premises in which he was residing on the date when the application for eviction was filed, that the premises was landlord's own premises by reason of the right of residence and therefore the petition filed by the landlord under section 10(3)(a)(i) of the Act, 18 of 1960, was not maintainable. Ramaprasada Rao, J. (as he then was) held that there a landlord is permissively in occupation of a residential building by reason of a right of residence obtained by him in a civil proceeding as between himself and the other members of his family, such a right is not an equation of ownership as is understood in jurisprudence. Learned Judge further pointed out that ownership is a peculiar concept which highlights on the individuality of the person who owns it and his exclusive right to deal with it under the eye of law.

8. Following the above decision, Nainar Sundaram, J. also in *K.S.SHANTILAL v. E.PENNY BIBER*, (1980) T.L.N.J.286 held that the ownership contemplated under the provisions of section 10(3)(a)(i) of the Act must be exclusive and it cannot be equated to joint ownership, which will leave the matter nebulous. In the present case, the premises required for the occupation of the

landlord's brother is an ancestral house in which the respondent landlord and his brother have undoubtedly a right of residence.

9. From a reading of the above decisions, it is manifest that the expression" is not occupying a residential building of his own" should be limited to the situation where the landlord is not occupying a residential building of which he is the sole owner thereof. Viewed in this angle, the petition by the landlord under section 10(3)(a)(i) of the Act is perfectly maintainable.

10. The revision petition, therefore, fails and is dismissed. However, there will be no order as to costs. Three months time is granted for vacating the premises on the petitioner's filing an undertaking.

R.S. ----- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *M.A.Sathar Sayeed, J.*

*C.R.P.No.1153 of 1954. 20th September, 1984.

K.AL.R.M. R.M.Alagappan *Petitioner**

v.

Rajaguru and Co., by its partner S.Rajarathinam *Respondent.*

Civil Procedure Code (V of 1908), Order 21, rules 37 and 38 - Execution petition for arrest - Executing Court passing orders for arrest - Order silent about the means of the judgment-debtor to pay or wilfully evading to pay the decree amount - Order set aside on revision.

In this case, nothing is found in the impugned order that the judgment debtor is having funds or that he is purposely delaying to pay the decretal amount. Under these circumstances the impugned order of the executing Court has to be set aside and it is accordingly set aside and the civil revision petition is allowed. The matter is remitted to the executing Court for fresh disposal. The executing Court after taking up the execution petition will issue notice to the parties and dispose of the matter after due enquiry according to law.
[Para.6]

Cases referred to:-

Jolly George Verghese v. Bank of Cochin, (1980)2 S.C.C.360= (1980) K.L.T.375= A.I.R.1980 S.C.470; *Ram Narayan Agarwal v. State of U.P.*, (1983)4 S.C.C.276= 54 S.T.C.273= (1983) Tax.L.R.3008= (1983)9 All.L.R. (Rev) 12= A.I.R.1984 S.C.1213.

K.T.Palpandian, for Petitioner.

G.Jeremiah, for Respondent.

The Court made the following

ORDER:- The above revision is filed by the judgment-debtor-petitioner herein (4th defendant in the suit) questioning the correctness of the order of the executing Court in E.P.No.197 of 1983 in O.S.No.21 of 1978, on the file of the Additional District Munsif, Madurai Town, dt. 2nd March, 1984.

2. It appears from the facts of the case and also as argued by the respective counsel appearing for the parties that the respondent herein obtained a decree against the petitioner herein in O.S.No.21 of 1978 on the file of the Sub-Court, Pudukkottai. Thereafter, the decree-holder filed E.P.No. 197 of 1983 under Order 21, rules 22, 37 and 38, Civil Procedure Code seeking arrest of the 4th defendant-petitioner herein. It was contended by the petitioner herein that the decree-holder-respondent cannot execute the decree

against the petitioner as per the terms of the agreement Exhibit B-1. It is on this ground it was contended by the judgment-debtor that he is not entitled to pay the decree amount nor is he liable to be arrested.

3. The executing Gourt, considering the validity of Exhibit B-1 held that Exhibit B-1 is not a registered document nor are three witnesses to this agreement entered into by the parties. Therefore, in so far as Exhibit B-1 is concerned, the executing Court disbelieved the same. It is under these circumstances, the executing Court directed that the judgment debtor be arrested by 27th March, 1984. It is this order that is questioned in the above revision.

4. Learned counsel, Mr.Palpandian, appearing for the petitioner, contends that in a case where the executing Court passes an order for the arrest of judgment-debtir or to put him in a civil prison, the Court must first be satisfied that the judgment-debtor is a person who is having funds and is evading payment of the decree amount. Reliance is placed on a decision reported in *Jolly George Verghese v. Bank of Cochin*, (1980)2 S.C.C.360= (1980)1 K.L.T.375= A.I.R.1980 S.C.470 and on the basis of this decision, it is contended by Mr.Palpandian that simple default in the payment of the decree amount to the decree-holder is not enough, but it is for the decree--holder to prove that there is an element of bad faith in the mind of the judgment- debtor and the judgment-debtor is deliberately attempting not to pay the decree amount in spite of the judgment- debtor having sufficient funds to pay. In the above said decision, the Supreme Court at page 475 has observed as follows:

"The simple default to discharge is not enough. There must be some element of bad faith beyond mere indifference to pay, some deliberate or recusant disposition in the 'past or, alternatively, current means to pay the decree or a substantial part of it."

5. Reliance is also placed on a decision reported in *Ram Narayan Agarwal v. State of U.P.* (1983)4 S.C.C.276= 54 S.T.C.273= (1983) Tax.L.R.3008= (1983)9 All.L.R. (Rev) 12= A.I.R.1984 S.C.1213. It is on the basis of these decisions, learned counsel for the petitioner contends that the impugned order of the Court below suffers from irregularity or illegality. He further contends that there is nothing in the impugned order to come to the conclusion nor is there any finding by the executing Court that the judgment-debtor is having enough means to pay or is wilfully evading to pay the decree amount. For want of these findings, it is contended that the impugned order of the court below is unjust, unreasonable and is contrary to law.

6. After perusing the impugned order of the Court below and after going through the decisions cited by the counsel for the petitioner, I am of the view that the learned counsel is perfectly justified in raising this point. In this case, nothing is found in the impugned order that the judgment-debtor is having funds or that he is purposely delaying to pay the decretal amount. Under these circumstances, I am of the view that the impugned order of the executing Court has to be set aside and it is accordingly set aside and this civil revision petition is allowed. The matter is remitted to the executing court for fresh disposal according to law. The executing Court, after taking up the execution petition No.197 of 1983 in O.S.No.21 of 1978 on its file, will issue notice to the parties and dispose of the matter after due enquiry according to law. There will be no order as to costs.

R.S. ----- *Revision petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *S.Swamikkannu, J.*

*C.R.P.No.4936 of 1982. 5th *April,* 1984.

Hari Krishnan (died) and others *Petitioners**

v.

Haji Fathima Beevi *Respondent.*

Pondicherry Cultivating Tenants Protection Act, 1970 (9 of 1971), section 3(4)(i) - Landlord filing petition against the tenant praying for an order directing the tenant to pay the arrears of rent to pass an order of eviction in the event of his failure to do so - Lower Court found that the tenant was in arrears - Time given to the tenant to deposit the arrears and to report compliance of the order on or before on particular date - Validity of the order challenged in revision.

The order under revision is certainly to be revised. But to what extent in the question. In this view, the observation in the last paragraph of the order under revision clearly shows that the lower Court had not only found the actual quantum of arrears liable to be paid by the revision petitioner herein but also added in the course of the very same trend that the order pronounced by him will work itself out in the event of the failure on the part of the revision petitioner herein not complying with his order within a specified date. At the same time, it is relevant to note that the lower Court had given a date for report relating to the compliance of the order. By this subsequent order requiring the revision petitioner herein to report it does not in any way cure the defect in the order of the lower court in its previous sentence wherein it had contravened the *ratio decidandi* of the Supreme Court by coupling the order of eviction with its finding that the revision petitioner had committed default in the payment of rent. In the circumstances, the order under revision is revised to the extent viz., the clause stating that eviction would follow if the amount is not deposited within the specified time is set aside. *[Para.7]*

Cases referred to:-

Chinnamarkathian v. Ayyavoo, (1982)1 S.C.J.142: (1982)1 M.L.J. (S.C.)17 : (1982)1 S.C.C.159: A.I.R.1982 S.C.137; *Mahanth Ram Das v. Ganga Das,* (1962)1 S.C.J.427: (1962)1 An.W.R. (S.C.) 167: (1962)1 M.L.J. (S.C.) 167: (1961)3 S.C.R.763: A.I.R.1961 S.C.882; *Thamirassu v. Kamalathammal,* (1984)1 M.L.J.11.

Petition under section 115 of the Civil Procedure Code read with section 10 of the Pondicherry Cultivating Tenants Protection Act praying the High Court to revise the Order of the Revenue Court, Karaikal dated 7-10-1982 and made in O.P.No.28 of 1980.

R.Thirugnanam, for Petitioners.

K.Yamunan, for Respondent.

The Court made the following

ORDER:- This Civil revision petition is filed under section 115 of the Civil Procedure Code and under section 10 of the Pondicherry Cultivating Tenants Protection Act, 1970 (hereinafter called the Act) by the respondent in O.P.No.28 of 1980 on the file of the Revenue Court, Karaikal. The revision petitioner herein died and so by the Order of this Court dated 27-9-1983 in C.M.P.No.11766 of 1983 the legal representatives of the petitioner had been brought on record. The respondent herein, Raji Fathima Beevi, filed before the Presiding Officer, Revenue Court, Karaikal O.P.No.28 of 1980 under section 3(4)(1) of the Act praying to pass an order directing the petitioner herein to pay the respondent herein, the rental arrears claimed; in the event of his failing to do so to pass an order directing eviction. On the point whether the revision petitioner herein is in arrears of 220 kalams of paddy for a period of four years effective from

1976-77, 1977-78, 1978-79 and 1979-80 and whether he has defaulted payment of arrears of rental paddy, the lower court had held that the revision petitioner herein is in arrears of 220 kalams of paddy for the period of four years effective from 1976-77 to 1979-80, the value of which amounted to Rs.5,805-80 no receipt for payment of paddy in support of the claim of the revision petitioner herein was produced before the lower court. Further more, this court has confirmed 55 kalams of paddy as the rent per year as held by the lower Court in O.P.No.18 of 1976. Therefore, the lower court directed the revision petitioner herein to deposit the above either in cash or in kind into the lower court within two months from the date of the order viz. 7-10-1982 failing which the revision petitioner herein shall be evicted from the petition mentioned lands. It is further stated in the order under revision that the revision petitioner herein should report compliance of the terms of the order on or before 7-12-1982.

2. On behalf of the respondent herein P.W.1 Ganesan was examined and Exhibits P-1 to P-4 were filed. On behalf of the revision petitioner, the revision petitioner himself had gone into the box and examined himself as P.W.1. No document was filed on behalf of the revision petitioner before the lower court.

3. It is submitted on behalf of the tenant revision petitioner herein that the lower court's order under revision inasmuch as it couples to order of eviction along with the order granting time for the deposit of the arrears of rent found by it to be due and payable by the revision petitioner herein and such a composite order is against the principle involved in section 3(4) of the Act. In this regard, the learned counsel for the revision petitioner refers to the decision in *Chinnamarkathian v. Ayyavoo*, (1982)1 S.C.J.142= (1982)1 M.L.J. (S.C.)17= (1982)1 S.C.C.159= A.I.R.1982 S.C.137 where it was held that when the Revenue Divisional Officer allows time to a cultivating tenant for depositing the arrears of rent in pursuance of the provisions of Clause (b) of Sub-section (4) of section 3 of the Act, he cannot simultaneously pass a conditional order of eviction which is to take effect on a default to occur in future. As order of that type can, in terms of the section, only be passed if the cultivating tenant fails to deposit the sum as directed. In the said decision, therefore, the orders of the Revenue Divisional Officer directing eviction of the tenants were held to have been passed in contravention of the express provisions of the Act and were without jurisdiction. In paragraph 14 of the said judgment, the Supreme Court observed as follows:

"It was seriously contended by Mr.Natesan as to what is there in the scheme of the Act and especially in the language of sub-setion (4)(b) which would make it impermissible for the Revenue Divisional Officer simultaneously passing an order determining rent in arrears and directing that if the tenant fails to pay the amount within the time prescribed by the court eviction shall follow as a matter of course. If this construction of sub-section (4)(b) as canvassed by Mr.Natesan is adopted the Revenue Divisional Officer would be denying to himself a more beneficial jurisdiction conferred upon him, namely, to extend the time for making the payment if on evaluation of circumstances so placed before him he is satisfied that a further extension is not only just but not to grant it would be harsh and unjust and would be defeating the object for which the Act was enacted.. An analogous provision may be noticed. It is a well accepted principle statutorily recognised in section 148 of Civil Procedure Code that where a period is fixed or granted by the court for doing any act prescribed or allowed by the code, the court may in its discretion from time to time enlarge such period even though the period originally fixed or granted may expire. If a court in exercise of the jurisdiction can grant time to do a thing, in the absence of a specific provision to the contrary

curtailing, denying or withholding such jurisdiction to extend time initially fixed by it. Passing a composite order would be acting in disregard of the jurisdiction in that while granting time simultaneously the court denies to itself the jurisdiction to extend time. The principle of equity is that when some circumstances are to be taken into account for fixing a length of time within which a certain action is to be taken, the court retains to itself the jurisdiction to re-examine the alternation or modification of circumstances which may necessitate extension of time. If the court by its own act denies itself the jurisdiction to do so it would be denying to itself the jurisdiction which in the absence of a negative provision, it undoubtedly enjoys. Conditional Orders were held by this Court to be in terrorem, so that dilatory litigants might put themselves in order and avoid delay, but they do not completely estop a court from taking note of events and circumstances which happen within the time fixed. In *MAHANATH RAM DAS v. GANGA DAS*, (1962)1 S.C.J.427= (1962)1 An.W.R. (S.C.) 167= (1962)1 M.L.J. (S.C.)167= (1961)3 S.C.R.763= A.I.R.1961 S.C.882 in the context of a failure to pay requisite court-fee within the time allowed by the court subject to the conditional order that failure to pay would result in dismissal of the appeal, this Court observed as under (at page 883 of A.I.R.) *[Para.5]*

"How undesirable it is to fix time peremptorily for a future happening which leaves the court powerless to deal with events that might arise in between, it is not necessary to decide in this appeal. These orders turn out, often enough to be inexpedient. Such procedural orders, though peremptory (conditional decree apart) are, in essence, in terrorem, so that dilatory litigants might put themselves in order and avoid delay. They do not, however, completely, estop a court from taking note of events and circumstances which happen within the time fixed. For example, it cannot aid that, if the appellant had started with the full money ordered to be paid and came well in time but was set upon and robbed by thieves on the day previous, he could not ask for extension of time, or that the court was powerless to extend it. Such orders are not like the law of the Medes and the Persians."

The danger inherent in passing conditional orders becomes self-evident because that by itself may result in taking away jurisdiction conferred on the court for just decision of the case. The true purport of conditional order is that such orders merely create something like a guarantee or sanction for obedience of the court's order but would not take away the court's jurisdiction to act according to the mandate of the statutes or on relevant equitable consideration if the statute does not deny such consideration. In order to avoid subsequent controversy sub-section (4)(b) envisages proceedings in two stages and that by itself inhibits passing of a conditional order. It is, therefore, not possible to accept the construction canvassed for and on behalf of the respondents."

4. The Supreme Court has held in the above decision that the scheme of sub-section 4(b) of section 3 requires the Revenue Divisional Officer to determine arrears, ascertain the exact amount payable by the tenant, fix the time for payment after taking into consideration the relevant circumstances of the landlord and the cultivating tenant and then stop there. There is no power in the Revenue Divisional Officer at that stage to pass an order for eviction.

5. The learned counsel for the revision petitioner herein also refers to the decision in *THAMIRASSU v. KAMALATHAMMAL*, (1984)1 M.L.J.11 in support of his contention. In the said decision it was held that there cannot be a direction by the presiding officer in the same order that the failure to deposit the paddy or its value within two months will result in the tenant

being evicted from the petition mentioned lands and that this was against the *ratio decidendi* of the Supreme Court embedded in the decision in *Chinnamarakathian v. Ayyavoo*, (1982)1 S.C.J.142= (1982)1 M.L.J. (S.C)17= A.I.R.1982 S.C.137.

6. On the other hand, Mr.Yamunan, learned counsel for the respondent submits that the order under revision is certainly against the *ratio decidandi* of both the decisions referred to above, but yet what he would submit is that so far as the finding relating to the actual amount of arrears of rent has to be retained and if this Court is inclined to set aside the order in revision and remit it back it may be only with respect to granting of time after hearing both sides and the order of remand should be confined only to the grant of reasonable time being granted for the payment of arrears of rent and nothing more.

7. The order under revision is certainly to be revised. But to what extend is the question. In this view, the observation in the last paragraph of the order under revision clearly shows that the lower court had not only found the actual quantum of arrears liable to be paid by the revision petitioner herein but also added in the course of the very same trend that the order pronounced by him will work itself out on the event of the failure on the part of the revision petitioner herein not complying with his order within a specific date. At the same time, it is relevant to note that the lower court had given a date for report relating to the compliance of the order. But this subsequent order requiring the revision petitioner herein to report does not in any way cure the defect in the order of the lower court in its previous sentence wherein it had contravened the *ratio decidendi* of the Supreme Court by coupling the order of eviction with its finding that the revision petitioner had committed default in the payment of rent. In the circumstances, the order under revision is revised to the extent viz., the clause stating the eviction would follow if the amount is not deposited within the specified time is set aside. In other respects regarding the quantum of arrears and the exact amount to be deposited in the lower court, the order under revision is retained. The matter is remanded for the specific purpose of passing an order of eviction in the case of default to pay after a report as contemplated by the lower court's order in complied with, because there is no power in the lower court viz., the Revenue Court to pass an order for eviction at that stage. In the circumstances, the civil revision petition is allowed and the matter is remitted to the lower court for fresh disposal in accordance with law and in the light of the observations made above. There would however be no order as to costs.

R.S. ----- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction)

Present:- *G.Ramanujam and K.Shanmugham, JJ.*

*W.A.No.558 of 1983. *7th November*, 1984.

The President/Correspondent, S.T.Hindu College Association, Nagercoil, Kanyakumari District *Appellant**

v.

K.Desappan and others *Respondents.*

(A) Tamil Nadu Private Colleges (Regulation) Act, 1976 (XIX of 1976), sections 20 and 40 - Scope and applicability.

(B) Constitution of India (1950), Article 226 - Professor of a private college - Service terminated - Relief of reinstatement and back wages claimed - Jurisdiction - Writ court to grant such reliefs.

Section 20 of the Tamil Nadu Private Colleges (Regulation) Act, 1976 provides for an appeal against the orders of punishment imposed on teachers and other persons employed in private colleges and section 21 provides for a second appeal in the case of dismissal, removal or reduction in rank or termination of appointment of teachers or other persons employed in private colleges to the Tribunal. In this case an appeal was filed against the order terminating the services under section 20 to the State Government. Section 40 seems to contemplate the first appellate authority or the second appellate authority passing orders of reinstatement and of payment of arrears of salary. Section 40(3) also contemplates an enquiry for the determination of the amount payable to the teacher by the management. Sub-section (4) of section 40 provides for default in making the deposit of the amount as determined by the Tribunal. In this case neither the first appellate authority nor the tribunal had passed any order of reinstatement of an order of payment of all back salary which has to be determined by the Tribunal after enquiry.

Held:- That without going into the question as to whether the High Court in exercise of writ jurisdiction can direct reinstatement or not the proper thing to be done in the writ petition is to pass an order remitting the proceedings to the first appellate authority. *[Para.4]*

Cases referred to:-

Prem Sagar v. S.V.O.C., (1964)1 Lab.L.J.47: (1964)5 S.C.R.1030: A.I.R.1965 S.C.111; *P.Kasilingam v. P.S.G.College of Technology*, (1981)1 Lab.L.J.358: (1981)1 S.C.C.405: (1981)Lab.I.C.189: (1981)2 S.C.R.490: A.I.R.1981 S.C.789; *Devendra Pratap v. State of U.P.*, (1962)2 S.C.J.282: A.I.R.1962 S.C.1334.

Appeal under Clause 15 of the Letters Patent against the Order of Mr.Justice V.Ramaswami, dated 30-6-1983 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No.5686 of 1981 presented under Article 226 of the Constitution of India to issue a writ of Mandamus, directing the 1st respondent to reinstate the petitioner into the service of the 1st respondent as Assistant Professor of Tamil with an attendant benefits and back wages in pursuance of the order made in W.P.No.3713/77, dated 8-7-1980.

O.V.Baluswami, for S.Ramaswami and R.Natarajan, for Appellant.

C.Chinnaswami, Additional Government Pleader and *S.Govindswaminathan*, for *V.Ramajagadeesan*, for Respondents.

The Judgment of the Court was delivered by

Ramanujam, J.:- In this writ appeal, the decision in Writ Petition No.5686 of 1981 directing the appellant to reinstate the first respondent herein with back wages and all other attendant benefits has been challenged.

2. The first respondent herein was appointed as Assistant Professor of Tamil in the appellant's college at Nagercoil on 9.12.1972. He was elected as a trustee along with four others of the Desiga Vinayagar Devasthanam Trust, Kottur, Nagercoil. The trusteeship is not an offence of profit but is only honorary. The nature of the trustee's work is mainly advisory intended to guide the members of the local Chetty community consisting of about 154 members related to one another. The said trusteeship does not in any way interfere with the discharge of the duties of the first respondent as an Assistant Professor in the College. However, a show cause notice was issued to the first respondent on 27-1-1975 to show cause as to why his services should not be terminated for violation of Clause 5 of the agreement executed by him with the appellant and Clause 15 of the conditions of service of teachers framed by the University, and ultimately his services were terminated on 13-5-1975. As against the said order, the first respondent filed an appeal before the Government, but the Government declined to interfere by its Memo, dated 29-4-1977. Against the order of the Government declining to interfere, Writ Petition No.3713 of 1977 was filed. That writ petition was allowed by Mohan, J. on 8-7-1980 holding that the first respondent is merely an honorary trustee of Desika Vinayagar Devasthanam Trust which is a family trust, that so long as such hereditary trusteeship does not interfere with the performance of his duties as an Assistant Professor, the same cannot be taken as a ground for terminating his services, and that the first respondent being an honorary trustee of the trust will not attract the mischief of Clause 5 or clause 15 of the conditions of service. Thereafter, the first respondent appears to have approached the appellant for taking him back into service. Since the appellant for taking him back into service. Since the appellant was not inclined to take him back into service, the first respondent filed Writ Petition No.5686 of 1981 out of which the present writ appeal arises, for the issue of a writ of mandamus directing the College to reinstate the first respondent into service as an Assistant Professor with arrears of salary and all attendant benefits in pursuance of the order, dated 8-7-1980 in Writ Petition No.3713 of 1977. That writ petition was resisted by the appellant herein on the following grounds: (1) that the relief by way of reinstatement and back wages with all attendant benefits is misconceived in law as such matters should be the subject-matter of an adjudication by a competent Tribunal; (2) Writ Petition No.3713 of 1977 was merely allowed and the order of termination of the service of the first respondent was quashed and the result was that the entire matter stood remitted to the Government for considering the relief to be given to the first respondent on the basis of the judgment in Writ Petition No.3713 of 1977. (3) The claim for reinstatement with full back wages without an order to that effect either by the first appellate authority or by the second appellate authority could not be entertained by the High Court. The above submissions of the appellant raised in defence in Writ Petition No.5686 of 1981 were not accepted, and the writ petition was allowed and a direction has been issued to the appellant to reinstate the first respondent within a period of 10 days.

3. In this appeal the main contentions advanced by the appellant are (1) that the decision under appeal is directly against the principles laid down by the Supreme Court in *Prem Sagar v. S.V.O.C.*, (1964)1 L.L.J.47: (1964)5 S.C.R.1030= A.I.R.1965 S.C.111 and *P.Kasilingam v. P.S.G.College of Technology*, (1981)1 L.L.J.358: (1981)1 S.C.C. 405= (1981)Lab.I.C.189= A.I.R.1981 S.C.789= (1981)2 S.C.R.490 (2) that the learned single Judge erred in law in applying the principle laid down by the Supreme Court in *Devendra Pratap v. State of Uttar Pradesh*, (1962)2 S.C.J.282= A.I.R.1962 S.C.1334 a case relating to civil service, (3) the relief of reinstatement and payment of back wages can be given only by the appellate authorities constituted under

the Tamil Nadu Private Colleges (Regulation) Act, 1976 and it is not within the province of the writ court to direct reinstatement with back wages and (4) the learned single Judge has constituted himself as an executive court to execute an order passed by Mohan, J. in Writ Petition No.3713 of 1977 on 8-7-1980 which in fact does not contain a direction for reinstatement and for payment of back wages. The question is how far the above contentions raised by the appellant are tenable.

4. The learned counsel for the appellant has taken us through the various provisions of the Tamil Nadu Private Colleges (Regulation) Act, 1976 to substantiate his contention that this court, in its writ jurisdiction, has no power to order reinstatement either under the general law or under the statute and that in this case it is only the appellate authority acting under section 20 read with rule 14 who can pass any order for reinstatement or for back wages. Section 20 provides for an appeal against the orders of punishment imposed on teachers and other persons employed in private colleges and section 21 provides for a second appeal in the case of dismissal, removal or reduction in rank or termination of appointment of teachers or other persons employed in private colleges, to the Tribunal. It is not disputed that in this case an appeal was filed against the order terminating his services under section 20 to the State Government. Section 40 seems to contemplate first appellate authority or the second appellate authority passing orders of reinstatement and of payment of arrears of salary. Section 40(3) also contemplates an enquiry for the determination of the amount payable to the teacher by the management. Sub-section (4) of section 40 provides for default in making the deposit of the amount as determined by the Tribunal. Thus in this case, neither the first appellate authority nor the second appellate authority nor the tribunal had passed any order of reinstatement or an order for payment of all back salary which has to be determined by the Tribunal after enquiry. As already stated, the first respondent moved the appellate authority under section 20 and the appellate authority declined to interfere. Thus the appellate authority has in a way affirmed the orders of termination passed by the appellant. It is only when the matter came before this Court in Writ Petition No.3713 of 1977 this Court allowed the writ petition holding the order of termination to be bad. No direction was given in the said writ petition either for reinstatement or for payment of back wages. The result of allowing the Writ Petition No.3713 of 1977 by this Court in restoration of the appeal filed before the first appellant authority for granting the necessary reliefs based on the order of this Court in Writ Petition No.3713 of 1977 holding the termination of service to be bad. Though the order passed in the said writ petition does not give any direction to the appellate authority to dispose of the appeal afresh, the result of allowing the said writ petition by this court will automatically lead to the conclusion that the appeal filed before the first appellate authority stands restored so that the appellate authority may, on the basis of this Court's decision that the order of termination is bad, will consider the grant of the consequent reliefs to the first respondent. However, the first respondent instead of going before the appellate authority, filed another writ petition seeking consequential relief based on the judgment of this Court in Writ Petition No.3713 of 1977. Since the question of reinstatement and payment of back wages will have to be considering by the appellate authorities constituted under Act if the order of termination is found to be bad and this Court cannot undertake an investigation as to what are the consequential reliefs the first respondent will be entitled to as per the order of this Court in the earlier writ petition. Once the order of termination of service is quashed by this Court, it is open to the first respondent to work out his rights as per the provisions of the said Act and he cannot convert this Court as an execution

court. It is no doubt true, at the stage when the first writ petition was disposed of, the court could have granted the relief consequent on its finding that the order of termination is bad. But so long as the consequential reliefs had not been granted in the order passed in the earlier writ petition, we do not see how the first respondent can approach this court for executing the order as if it were an order passed by this Court in the earlier writ petition seeking the consequential reliefs which he can get by approaching the authorities concerned. Thus, without going into the question as to whether this Court in exercise of its writ jurisdiction can direct reinstatement or not, we hold that the proper thing to be done in the writ petition is to pass an order remitting the proceedings before the first appellate authority who had earlier dismissed the first respondent's appeal with a direction to the first appellate authority to consider the question of grant of consequential reliefs prayed for by the first respondent by way of reinstatement and back wages.

5. The writ appeal is, therefore, allowed and the order of the learned single Judge is set aside and in its place there will be a direction to the first appellate authority to restore the appeal filed by the first respondent and dispose of the same in the light of the reliefs given by this Court in Writ Petition No.3713 of 1977. There will, however, be no order as to costs.

6. Having regard to the long lapse of time since the order of termination was passed, the State Government is directed to dispose of the appeal afresh within three months from the date of receipt of this order.

R.S. ---- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

Present:- *Mohan, J.*

*W.P.No.3298 of 1979 and C.R.P.No.1050 of 1979. *7th February, 1985.*

V.Ramalingam *Petitioner**

v.

Government of India represented by the Under Secretary, Ministry of Shipping and Transport (Transport Wing), New Delhi and others *Respondents.*

(A) Motor Vehicles Act (IV of 1939), section 50 - Powers to grant permits under - Not administrative bar but quasi-judicial in nature.

(B) Motor Vehicles Act (IV of 1939), sections 63(7) and 63(10)(iii) - Guidelines issued under the exercise of rule-making and residuary powers - Have no binding force on the authorities entrusted with the power to grant permit - Orders passed by the State Transport Authority and the State Transport Appellate Tribunal on the basis of the guidelines set aside.

As to the principles which should guide the concerned authorities under Motor Vehicles Act in granting All India Tourist Coach permits under a single point tax and whether the guidelines issued by the Government of India in its letter T.I.T/24/75 dated 29.12.1975 of the Ministry of Transport and Shipping have binding force on the authority entrusted to grant the permit,

Held:- It being the case of an All India Contract Carriage Permit, section 63(7) of the Motor Vehicles Act applies and the provisions of sections 49-51, 57-61 and 64 should as far as may be also apply. In the light of these provisions permits have to be issued. The grant of permit is a quasi-judicial function. It is well-settled in law that no judicial or quasi-judicial authority

can be instructed to do a particular thing. The issue of such instructions to quasi-judicial authority cannot be brooked however high that authority may be. If that judicial authority happens to follow those administrative instructions it would be tantamount to a clear abdication of judicial powers. A reading in the present case of the order of the State Transport Authority clearly discloses that the basis of its order is the Instruction, of the Government of India which came to be incorporated by the Government of Tamil Nadu in its G.O.Ms.No.2264 dated 10.9.1976 it is clearly beyound dispute that the Transport Authorities clearly abdicated their judicial function.

The argument that in the absence of rules in the exercise of rule-making power there could be guidelines has been deprecated and cannot be accepted. It is not either too much or unreasonable to expect a quasi-judicial authority to follow the provisions of Statutes and the rules made in that behalf (if any) while considering the grant in accordance with section 50 and section 63(7) which make a pointed reference to the various provisions of the Motor Vehicles Act. *[Para.16]*

The instruction of the Government of India made TIT (24)/75 dated 23.12.75 will have absolutely no binding force on the authority entrusted with the power to grant the permit. This will govern both State Transport Authority and the Tribunal. The grant of permit will have to be considered *de hors* the instructions. *[Para.17]*

Cases referred to:-

B.Rajagopala Naidu v. The State Transport Appellate Tribunal, Madras, (1964)2 S.C.J.570= A.I.R.1964 S.C.1573= (1964)2 M.L.J. (S.C) 131= (1964)2 An.W.R. (S.C.) 131; *R.M.Subhraj v. Kodaikanal Motor Union (P) Ltd*, (1973)1 S.C.J.337= A.I.R.1972 S.C.2266: (1973)1 An.W.R. (S.C) 56= (1973)1 M.L.J. (S.C.) 56= (1973)3 S.C.C.871; *P.Palaniswami v. Shri Ram Popular Service (P) Ltd.*, (1974)2 S.C.C.322= A.I.R.1974 S.C.1117= (1974)1 S.C.C.197; *I.L.Honnegouid v. State of Karnataka*, (1977)1 S.C.J.524= A.I.R.1978 S.C.28.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records connected with communication in TIT/24/75 dated 29-12-75 on the file of the 1st respondent and which are referred to by the State Transport Appellate Tribunal, Madras in Appeal No.219/77 dated 26-8-78 and quash the same in so far as the petitioner is concerned, etc.

G.Ramaswami, for Petitioner.

The Court made the following

ORDER:- The Writ petition and the civil revision petition are interconnected. As to what the interconnection is, I will immediately point out. Applications were invited for the grant of 10 All India Tourist Coach Permits under a single point Tax. The capacity of the vehicle was 29 seats. The invitation was by a Notification dated 20-12-1976 in R.No.86470/B6/76. In all, there were 126 applications. On 31-12-1976 the State Transport Authority, Madras heard these applications. By its order dated 7-1-1977 it granted 10 permits as under:

1. 3 permits to Tamil Nadu Tourism Development Corporation Limited.

2. 1 permit to Pandiyan Roadways Corporations Limited.

3. 3 permits to Indian Tourism Development Corporation Limited.

4. 1 permit to Sita World Travel.

5. 2 permits to Pallavan Transport Corporation (presently transferred to

Thiruvalluvar Transport Corporation, which has been brought on record in C.M.P.No.13059 of 1981 on 23.12.1981.

2. It should be stated at this state that the order of the State Transport Authority was based upon the guidelines issued by the Government of India in its letter T.I.T/24/75 dated 29-12-1975. Against this order, the writ petitioner (V.Ramalingam) preferred Appeal No.219 of 1977 before the State Transport Appellate Tribunal. There were also several appeals and in all there were 10 appeals. All of them came to be considered by the State Transport Appellate Tribunal. On 26-8-1978 the Tribunal dismissed the Appeal of the writ petitioner, who was the fifth appellant before it as well as the other appeals, following the same guidelines issued by the Government of India. It is under these circumstances, W.P.No. 3298 of 1979 has been filed by the petitioner, challenging the validity of the guidelines issued by the Central Government in the matter of permits and to quash the same by the issue of a writ of *certiorari*.

3. C.R.P.No.1050 of 1979 is against the concurrent orders, declining the permit to the revision petitioner both by the State Transport Authority and the State Transport Appellate Tribunal. This is how both these cases are inter-connected.

4. Mr.G.Ramaswami, the learned counsel appearing for the petitioner submits that there are catena of decisions where it has been held that it is not possible for a judicial authority to abdicate its function and felt bound by the instructions of the Government. Both the State Transport Authority as well as the State Transport Appellate Tribunal are exercising the judicial or, at any rate, the quasi-judicial function. In so far as it considers the grant of permit. Therefore, they will have to merely allow the statutory provisions and cannot take note of any administrative instruction issued by the authority, however, high he may be. In support of the submission, reliance is placed on decisions reported in *B.Rajagopala Naidu v. The State Transport Appellate Tribunal, Madras, and others*, (1964)2 S.C.J.570= (1964)2 M.L.J. (S.C) 131= (1964)2 An.W.R. (S.C) 131= A.I.R.1964 S.C.1573; *R.M.Subhraj v. Kodaikanal Motor Union (P) Limited*, (1973)1 S.C.J.337= (1973)1 An.W.R. (S.C) 56= (1973)1 M.L.J. (S.C) 56= (1973)3 S.C.C. 871= A.I.R. 1972 S.C.2266 and *P.Palaniswami v. Shri Ram Popular Service (P) Limited and another*, (1974)2 S.C.J.322= (1974)1 S.C.C.197= A.I.R.1974 S.C.1117.

5. Thus, it is argued that if the matter had been considered independently either by the original authority or by the Tribunal something could be said in favour of those orders. But in so far as the grant of permit proceeds purely upon these guidelines, the orders cannot be supported at all. The guidelines cannot stand so as to take away or cast a fetter on the exercise of judicial function and, therefore, the writ petition should be allowed, likewise the revision, because of the following of the guidelines by both the authorities.

6. The first respondent, the Government of India, alone has filed its counter affidavit. The stand taken in the counter affidavit in paragraph 4 is that in the absence of the formal rules having been framed either by the Central Government or by the State Government in exercise of powers in section 63(7) of the Motor Vehicles Act, these guidelines were issued by the exercise of rule-making powers as well as the residuary powers contained in clause (iii) of sub-sectin (10) of section 63 of the Motor Vehicles Act. Hence, the guidelines are not illegal or void. In paragraph 5 of the counter affidavit an amendment to section 63(7) incorporating the proviso is relied on. The learned Government Pleader urges that in so far as the procedure under section 47 is not required to be followed, in the case of grant of stage carriage permit, there is no bar to the issue of guidelines. Those guidelines are only in furtherance of the object of

the statute viz. section 63 and, therefore, they are not illegal. If that be so, the orders can easily be upheld.

7. Mr.N.G.Krishan Iyengar, the learned counsel appearing for the two other grantees, that is Pallavan Transport Corporation and Pandiyan Transport Corporation, would submit that the invitation to the application were on the basis of these guidelines. Therefore, it cannot be said that the petitioner was not unaware that the guidelines would be valid for the purpose of grant. Where, therefore, the petitioner stake his claims and took a chance with regard to the grant of permit, he cannot now be heard to say that the following of the guidelines is improper. Certainly, he would not have come forward with such a plea had be had the benefit of permit by the following of the guidelines. Therefore, the principle of acquiescence, according to him, would apply, which is so stated in *I.L.Honnegoudd v. State of Karnataka and others*, (1977)1 S.C.J.524: A.I.R. 1978 S.C.28.

8. In order to appreciate the respective contentions between the parties, it is necessary on my part to extract the guidelines, which form the subject matter of controversy between the parties. The Government of India, Ministry of Shipping and Transport (Transport Wing) in T.I.T.24/75 dated 29-12-1975 issued the following guidelines:-

"(i) The State Governments/Union Administrations may issue permits only after the revised notifications prescribing specifications of tourist vehicles is issued by the Ministry under section 63(1)(1) of the Motor Vehicles Act, conform to the type of standard of comfort etc. laid down in the revised notification.

(ii) Public sector undertakings of Central/State Governments and private tourist car operators who are on the approved list of the Department of Tourism and who have some foreign exchange earnings at their credit may be given preference over others in the matter of allotment of all India permits.

(iii) In the case of approved private operators, the number of permits should be linked to the amount of foreign exchange earnings.

(iv) For allotment of permits for coaches, preference should be given to the owners of air-conditions coaches, and the next preference for deluxe coaches complying with the revised specification."

9. Thereupon, the Government of Tamil Nadu passed G.O.Ms.No.2254, Home Department, on 10-9-1976 under the following terms:-

Government of Tamil Nadu

Abstract

Motor Vehicles - Tourist Vehicles - All India Permits - Grant of.

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Home Department

G.O.Ms.No.2254 dated 10th September, 1976.

Read: -

1. G.O.Ms.No.3225, Home dated 29-11-71.
2. G.O.Ms.No.1180, Home dated 22-4-72.
3. G.O.Ms.No.2692, Home dated 15-10-75.

Read also:

From the Government of India, Letters No.T/TIT/24/75, dated 29-12-1975 and 5-7-1976.

From the Transport Commissioner, Letter No.3003/E2/76, dated 22-7-1976.

ORDER:- Under Sub-section (7) of Section 63 of the Motor Vehicles Act a State Transport Authority may, for the purpose of promoting tourism, grant in respect of tourist vehicles such number of permits valid for the whole or any part of India, as the Central Goverment may fix. The Government of India have fixed the following quota of tourist vehicles for the State of Tamil Nadu:

Table

Class of Tourist Vehicle	Number of Permits
1.	2.
i. Tourist Motor Cab	100
ii. Tourist Omni bus with passenger capacity not exceeding 29.	15
iii. Tourist Omni bus with passenger capacity exceeding 29.	10

The Government of India have published the revised specifications for tourist vehicles under section 63(1) of the Motor Vehicles Act. The Government of India have also mentioned that all the States except two have agreed to exempt tourist vehicles from road tax and passenger tax and that steps may now be taken to issue permits for tourist vehicles to be effective throughout the country, except the two states referred to above.

2. As regards grant of permits, the Government of India have suggested the following guidelines:

"i. Public Sector undertakings of Central/State Governments and private tourist car operators who are on the approved list of the Department of Tourism and who have some foreign exchange earnings at their credit may be given preference over others in the matter of allotment of all India Permits.

(ii) In the case of approved private operators, the number of permits should be linked to the amount of foreign exchange earnings.

(iii) For allotment of permits for coaches, preference should be given to the owners of air-condition coaches, and the next preference for deluxe coaches, complying with the revised specifications.

The Government of India have also stated that the form of application for tourist vehicles prescribed by the State Transport Authority, New Delhi, may be adopted in all States to ensure uniformity in regard to the details to be published in the application form for permits. The Government accept the above suggestions of the Government of India.

3. The Transport Commissioner has pointed out that according to the orders in G.O.Ms.No.1180, Home, dated 22-4-1972 All India Tourist Bus permits should be granted only to the State Transport Undertakings and has requested for a revision of this order. The orders in G.O.Ms.No.1180, Home, dated 22-4-1972 are hereby cancelled. The Director, Tamil Nadu State Transport Department has published a scheme for nationalising the contract carriage permits in the State of Tamil Nadu and certain Writ petitions filed by operators are pending in the High Court. The question of formulating a revised scheme is under consideration of the State Transport Undertaking. Necessary action will be taken by the Government in the Transport Department to exclude tourist vehicles that may be granted permits under section 63(7) of Motor Vehicles Act while republishing the scheme.

(By order of the Governor)

Sd. K.Subramaniyam
Special Secretary to Government.

It cannot be gainsaid that section 47 is inapplicable to the grant of contract carriage permit. This is because section 47 deals with the grant of stage carriage permit. It is section 50 that lays down the procedure for the Regional Transport Authority to follow, while considering the application for contract carriage permit. It says that the Regional Transport Authority shall consider an application for a contract carriage permit, having regard to:

(1) The extent to which additional contract carriages may be necessary or desirable;
(2) In the public interest;
(3) Shall also take into consideration any representations, which may then be made or which may previously have been made by persons already holding contract carriage permits in the region;
(4) By any local authority;
(5) or police authority in the region to the effect that the number of contract carriage for which permits have already been granted is sufficient for or in excess of the needs of the region or any area within the region.

10. I have to analyse the section to show that the power exercised under section 50 is not an administrative power. On the contrary, having regard to the scope of the section, which has been analysed as above, it is beyond any reasonable doubt that it is a quasi-judicial power. On this basis, I will proceed to consider the respective submissions.

11. Section 63 deals with the validation of permits for use outside the region in which permits were granted. This being an All India Contract Carriage permit, undoubtedly the section would applv. Sub-section (7) is important for our present purpose. That is extracted below:

"(7) Notwithstanding anything contained in sub-section (1) but subject to any rules that may be made under this Act,any State Transport Anthority

may, for the purpose of promoting 'Tourism' grant (permits valid for the whole or any part of India, in respect of such number of tourist vehicles) as the Central Government may, in respect of that State, specify in this behalf, and the provisions of sections 49, 50, 51, 57, 58, 59, 59-A, 60, 61 and 64 shall, as far as may be apply in relation to such permits'. Provided that preference shall be given to applications for permits from -
i. The India Tourism Development Corporation;
ii. A State Tourism Development Corporation;
iii. A State Tourist Department;
iv. such operators of tourist cars, or such travel agents, as may be approved in this behalf by the Ministry of the Central Government dealing in tourism).'

I may at once state that the proviso has no application, because that was introduced by amending Act 48 of 1978, which came into force on 16-1-1979. Therefore, that can have no application at all to the facts of the present case, since the order of the State Transport Authority is dated 7-1-1977, while the Appellate order is dated 26-8-78. Therefore, the learned Government Pleader is not correct in relying upon this proviso. Be that as it may, of course, the rules may be made under this sub-section, enabling any State Transport Authority to grant All India Permit for the purpose of promoting tourism. While considering that grant, as the sub-section itself states, regard can be had to the various other sections like sections 49, 50, 51 etc. Therefore, in the light of these two sections, permits have to be granted. In so far as I have observed above, that the grant of permit is of a quasi-judicial function, it is well settled in law that no judicial or quasi-judicial authority can be instructed to do a particular thing. In other words, the issue of such instruction to quasi judicial authority cannot be brooked however high that authority may be. If that judicial authority happens to follow those administrative instructions, it would be tantamount to a clear abdication of judicial powers. Authorities in this regard are not wanting. First I may refer to a decision in *B.Rajagopala Naidu v. The State Transport Appellate Tribunal, Madras and others*, (1964)2 S.C.J.570= (1964)2 M.L.J. (S.C.) 131= (1964)2 An.W.R. (S.C.) 131= A.I.R. 1964 S.C.1573. In that case G.O.Ms.No. 1298 dated April 28, 1956 issued by the Government of Tamil Nadu under section 63-A, giving directions to Tribunal in matters which had to be dealt with in quasi-judicial manner was held to be invalid. The order of the Tribunal, solely based on the basis of such a Government Order, was quashed. In so doing, their Lordships of the Supreme Court made the following observations in paragraph 19:-

"In reaching this conclusion, we have been influenced by certain other considerations which are both relevant and material. In interpreting 'section 43A, we think, it would be legitimate to assume that the legislature intended to respect the basis and elementary postulate of the rule of law, that in exercising their authority and in discharging their quasi-judicial function the Tribunals constituted under the Act must be left absolutely free to deal with the matter according to their best judgment. It is of the essence of fair and objective administration of law that the decision of the Judge or the Tribunal must be absolutely unfettered by any extraneous guidance by the executive or administrative wing of the State. If the exercise of discretion conferred on a quasi-judicial tribunal is controlled by any such direction, that forges fetters on the exercise of quasi-judicial (tribunal is controlled by any such direction, that forges fetters on the exercise of quasi-judicial authority and the presence of such fetters would make the exercise of such) authority completely inconsistent with the well-accepted notion of judicial process. It is true that law can regulate the exercise of judicial powers. It may indicate by specific provisions on what matters

the tribunals constituted by it should adjudicate. It may by specific provisions lay down the principles which have to be followed by the Tribunals in dealing with the said matters. The scope of the jurisdiction of the Tribunals constituted by statute can well be regulated by the statute and principles for guidance of the said tribunals may also be prescribed subject of course to the inevitable requirement that these provisions do not contravene the fundamental rights guaranteed by the Constitution. But what law and the provisions of law may legitimately do cannot be permitted to be done by administrative or executive orders. This position is so well established that we are reluctant to hold that in enacting section 43-A the Madras Legislature intended to confer power on the State Government to invade the domain of the exercise of Judicial power. In fact, such had been the intention of the Madras Legislature and had been the true effect of the provisions of section 43-A. Section 43-A itself would amount to an unreasonable contravention of fundamental rights of citizens and may have to be struck down as unconstitutional. That is why the Madras High Court in dealing with the validity of section 43-A had expressly observed that what section 43A purported to do was to clothe the Government with authority to issue directions of an administrative character and nothing more. It is somewhat unfortunate that though judicial decisions have always emphasised this aspect of the matter, occasion did not arise so long as to consider the validity of the Government order which on the construction suggested by the respondent would clearly invade the domain of quasi-judicial administration."

12. The next ruling which came to be referred is *R.M.Subharai v. Kodaikanal Motor Union (P) Limited and others*, (1973)1 S.C.J.337= (1973)1 An.W.R. (S.C.) 56= (1973)1 M.L.J. (S.C.)56= A.I.R.1972 S.C.2266. Here again, another order of the Tamil Nadu Government made in G.O.No.2265 dated 9-8-1958, directing the issue of stage carriage permit on the basis of that Government order was held to be bad on the following observations in paragraphs 9 and 11:-

This Court as in several decisions held that the Regional Transport Authority discharges quasi-judicial function in dealing with applications for permits and evaluating the rival claims of the parties for the grant of permit. Section 43-A of the Motor Vehicles Act, 1939, as inserted by the Madras Amending Act 20 of 1948 confers power on the State Government to issue orders and directions to the State Transport Authority only in relation to administrative functions. It is also held by this Court that the decision of the Regional Transport Authority' must be absolutely unfettered by any extraneous guidance by the executive or administrative wing of the State."

"It is manifest that the State Transport Appellate Tribunal not only referred to the Government Order as indicating the basis for giving preference for the grant of permits but also applied the Government Order in assessing the competing claims of the contenders for permits. Once it is found that a Tribunal which under the statute has to deal with applications for permits in a judicial manner is directed by the Government to adopt any specified method for assessing the merits of the applicants and the Tribunal takes into consideration such direction of the executive, the judicial determination by the Tribunal is polluted.'

13. In *P.Palaniswami v. Shri Ram Popular Service (P) Limited and another*, (1974)2 S.C.J.322= A.I.R.1974 S.C.1117 the extract of headnote would suffice for our purpose:

"When there is a Government Order in existence and parties applying for permits come to know that the authorities under the Act were disposing of their applications for permits in accordance with the order, matters not referred to in the order

but which may be very germane for consideration under section 47 get automatically excluded during the hearing. Where the decision of the Transport Appellate Tribunal in respect of the applications for permits is polluted because of the instructions contained in the Government Order, the Court is justified in remanding the case to the tribunal for a re-hearing without the constraint of the Government Order.'

14. In view of the settled position of law, I do not think it is necessary for me to refer to the other cases, which arose before this court. Therefore, Mr.G.Ramaswami is well founded in his submission that the case on hand falls squarely within the ratio of the above Supreme Court's rulings. A reading of the order of the State Transport Authority clearly discloses that the basis of the order is the instruction of the Government of India, which came to be incorporated by the Government of Tamil Nadu in G.O.Ms.No.2254 dated 10-9-1976. What is more surprising is the State Transport Appellate Tribunal manned by a District Judge should have chosen to follow these guidelines. In paragraph 6 of its order it states:

> "All these ten permits in question have to be granted following the guidelines, as stated supra prescribed by the Government of India. The above guidelines divide the category of the tourist operators into two viz., public sector undertakings of Central or State Governments and private tourist operators viz., who are on the approved list of the Department of Tourism and who have some foreign exchange earnings at their credit...."

Therefore, it is beyond dispute now that the Transport Authorities clearly abdicated the judicial function and proceeded to grant the permit purely on the basis of the Government Order. Consequently, it should be held that the ratio of the Supreme Court's rulings applies to this case with full vigour.

15. I am unable to accept the argument of the learned Government Pleader that in the absence of rules, there could be guidelines. This is precisely what was deprecated by the Supreme Court. In the case dealt with by the Supreme Court, Government orders were made under section 43-A of the Motor vehicles Act in exercise of the rule-making power. Therefore, even section 63, sub-section 10(iii) will not come to the rescue of the Government.

16. I am equally unable to accept the argument of Mr.N.G.Krishna Iyengar that because the invitation to applications made in R.No.86470/B6/76 dated 20-12-1976 mentioned that the applications will be considered on the basis of these guidelines, the petitioner is estopped from contending that the guidelines are bad. There is no question of acquiescence in this case. No doubt, he did apply pursuant to the above invitation. But that does not mean that a quasi-judicial authority can abdicate his function and yet when such abdication is known to the petitioner, he should remain silent on the basis of the principle of acquiescence. What has he to do than to apply at the call of the invitation? It is not either too much or unreasonable to expect a quasi-judicial authority to follow the provisions of the statute and the rules made in that behalf (if any) while considering the grant in accordance with section 50 and section 63(7) which made a pointed reference to the various provisions of the Motor Vehicles Act. From this point of view, I see no relevance in the ruling reported in *I.L.Honnegoudd v. The State of Karnataka and others*, (1977)1 S.C.J.524= A.I.R. 1978 S.C.28 cited on behalf of the grantees.

17. Thus, in conclusion, I hold that the instruction of the Government of India in TIT (24)/74 dated 29-12-75 will have absolutely no binding force on the authority entrusted with the power to grant the permit. It is needless to say that the statement will

govern both the State Transport Authority as well as the Tribunal. This would obviously mean, the grant will have to be considered *do hors* the instrcutions, which are undoubtedly bad, as they fettered the judicial discretions of the above authority. In view of this conclusion, I have no other option, but to remit the matter to the State Transport Authority for reconsideration, which procedure was approved by the Supreme Court in *P.Palaniswami v. Shri Ram Popular Service (P) Limited, and another*, (1974)2 S.C. J.322= A.I.R.1974 S.C.1117. Accordingly, I set aside the orders of both the State Transport Authority and the State Transport Tribunal and remit the matter to the State Transport Authority for reconsideration in the light of what I have observed above. I make it clear that the lis is only between the petitioner (V.Ramalingam) on the one hand and the grantees on the other. There is absolutely no necessity to consider the case of other applicants or the appellants, as the case may be, before the State Transport Authority or the State Transport Appellate Tribunal respectively. The matter will have to be considered and orders passed on or before 15-4-1985. Till orders are so passed, it will be open to the present respondents (Grantees) to continue the transport operation without any let or hindrance whatsoever.

18. Accordingly, the writ petition and the civil revision petition will stand allowed with costs. One set, Counsel's fee Rs.500/-. The first respondent, the Government of India, is directed to pay the costs of the petitioner.

K.S. ---- *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *P.R.Gokulakrishnan and G.Maheswaran, JJ.*

*C.M.P.No.12744 of 1984 in O.S.A.No.22 of 1979. 12*th December*, 1984.

Ganshamadas Girdhardas and others
*Petitioners**

v.

V.Sivaramasubramanian and others
Respondents.

Civil Procedure Code (V of 1908), Order 38, rule (1) and Order 21, rule 42 and sections 64 and 151 - Attachment of the property of the judgment-debtor when can be made.

On the question whether after mesne profits have been ascertained and fixed as per the decree and satisfied and the concerned E.P. was also closed the attachment made can be directed to continue during pendency of an appeal filed against the quantum of such mesne profits awarded,

Held:- Order 38, rule 5, Civil Procedure Code, applies in terms to suits. A petitioner cannot in terms invoke the aid of section 141 of the Code which is to the effect that the procedure provided in the Code with regard to suits can be followed as far as it is made applicable, in all proceedings in any court of civil jurisdiction. Section 141 applies only the procedure under the Code to other proceedings in a Court of Civil Jurisdiction and not substantive rights. In this case the petitioner cannot invoke the provisions of section 141 of the Code of Civil Procedure and consequently the petitioners cannot seek the relief under Order 38, rule 5 Civil Procedure Code.
[Para.4]

Order 21, rule 42 of the Code provides that where a decree directs an inquiry as to rent or mesne profits or any other matter, the property of the judgment-

debtor may, before the amount due from him has been ascertained, be attached, as in the case of an ordinary decree for the payment of money. In this case the enquiry into mesne profits has been made. The amount has been ascertained. The property of the respondent was sought to be sold in execution, of the decree and the respondents have paid the entire amount due under decree and the full satisfaction of the decree has been recorded. Order 21, rule 42, Civil Procedure Code authorises attachment for mesne profits before the amount of such profits has been ascertained. The petitioner now wants to attach the property for realisation of any excess amount that may be granted to him in appeal. To such proceedings, Order 21, rule 42, Civil Procedure Code is not applicable. *[Para.6]*

It is well-settled that the inherent powers are to be exercised by the Court in very exceptional circumstances for which the Code lays down no procedure. In this case the prayer for attachment before judgment made earlier has been negatived. It was also found that it is not expedient in the interest of justice to attach the property pending disposal of the appeal. It should also be seen in this case that attachment could not said to be an order necessary in the interest of justice or to prevent the abuse of the process of the Court. Therefore the inherent powers of this Court cannot be invoked. *[Para.7]*

Cases referred to:-

Philips v, Philips, (1910) I.L.R.37 Cal.613; *Manohar Lal v. Seth Hiralal*, A.I.R.1962 S.C.527.

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to direct that the attachment of the property viz., the buildings and structures and the land appurtenant at Nos.77 and 77-B Omalur Main Road, Salem belonging to the respondents and described in the schedule hereto already effected in E.P. No. 295 of 1979 in C.S.No.28 of 1964 on the file of the Court of the Subordinate Judge. Salem do continue (or) directing the respondents herein to furnish security for the amount claimed in O.S.A.No.22 of 1979 inclusive of further interest and costs (or) directing the respondents herein be and are hereby restrained not to sell, encumber or otherwise alienate the property described in the schedule hereto without obtaining the prior permission of this Court until the decree that may be passed in O.S.A.No.22 of 1979 is fully satisfied, pending O.S.A.No.22 of 1979 preferred to the High Court under clause 15 of the Letters Patent and Order 36, rule 1 of O.S.Rules against the Judgment and Decree of Mr.Justice N.S.Ramaswamy dated 26-4-1977 and made in ordinary original Civil Jurisdiction in C.S.No.28 of 1964.

SCHEDULE

Cinema Theatre Building and all other superstructures at Door Nos.77 and 77-B in the Eastern wing of Omalur Main Road Ward No.7 D Division, Salem Town, Salem Taluk, Salem Sub-District and Salem District, East of Omalur Main Road, South of Thammanna Chettiar Road, West of Y.M.C.A.Building and Mahajana High School Building and North of originally the District Board Building and presently the Super-market building and Municipality vacant land comprised in Old T.S.Nos.727/3-4/2067, T.S.Nos.729 and 730 as per New Survey Ward No.8 Block No.18, New T.S.No.2-0.66 cents, T.S.No.3-0.24 cents and T.S.No.31-0-86 cents.

Shama Doss for *L.V.Krishnaswamy Ayyar*, for Petitioners.

Advocate General for *R.Mohan*, for Respondents.

The Order of the Court was made by

Maheswaran, J:- The reliefs prayed for in this application can be extracted in the words of the 14th appellant who has sworn to an affidavit in support of this application. The petitioners pray for orders of this Court directing.

1) the attachment of the property, viz., the buildings and structures and the land appurtenant thereto, at No.77 and

77-B, Omalur Main Raod, Salem, belonging to the respondents and described in the schedule to the petition, already effected in E.P.No.295 of 1979 in C.S.No.28 of 1964 on the file of the Sub-Court, Salem, do continue pending disposal of O.S.A.No.22 of 1979 so that suitable orders may be passed at the time of disposal of O.S.Appeal No.22 of 1979: or

2. The respondents herein to furnish security for the amount claimed in O.S.A.No.22 of 1979 inclusive of further interest and costs; or

3. the respondents herein be and are hereby restrained not to sell, encumber or otherwise alienate the property described in the schedule to the petition without obtaining the prior permission of this Court until the decree that may be passed in O.S.A.No.22 of 1979 is fully satisfied.

2. The facts as gathered from the rambling affidavit filed in support of the petition, shorn of all unnecessary details, may be stated. The appellants who are the petitioners, filed a suit in C.S.No.28 of 1964 for a declaration that "the plaintiffs-appellants are, as from 1-3-1964 the owners of the buildings and superstructures constructed by the first defendant on the lands leased to him" and for possession of the buildings on the site and also for mesne profits at the rate of Rs.12,000/- per month from 4-8-1968 till possession is handed over. (The affidavit does not say as to what decree was passed by the learned trial Judge. But, it is seen that the Supreme Court by its judgment dated 18-8-1971 in Civil Appeal No.74 of 1971 has passed a decree in respect of the first relief of declaration, but directed this Court to determine the mesne profits in accordance with law. It is seen that the first defendant has delivered possession of the suit sites with the buildings on 23.4.1974. Pending determination of mesne profits, the first defendant died and his legal representatives brought on record. N.S.Ramaswami, J. learned single Judge of this court, fixed the mesne profits payable by the defendants at Rs.6,250/- per month from 4-8-1968 to 23-3-1974 with interest at 6 per cent. The appellants have now filed O.S.Appeal No.22 of 1979 before this Court for Rs.8,12,075-15 (wrongly stated as Rs.8,12,07.15 in the affidavit) being the difference between the amount claimed and the amount decreed with interest at 12 per cent. The petitioners say that they are confident of their appeal being allowed and they would be entitled to nearly Rs.16,00,000/-. It is further stated that the property of the first defendant, Varadaraja Pillai, which are in the hands of the second defendant, at No.77 and 77-B, Omalur Main Road, was attached for realisation of the balance due under the decree dated 26-4-1977, but the said E.P.No.295 of 1979 was closed on 10-7-1981 directing the attachment to continue and that another execution petition, E.P.No.113 of 1982, for sale of the property already attached in E.P.No.295 of 1979 was filed and the same was pending and the balance of Rs.1,11,525-51 is due under the decree of the trial Judge. The petitioners pray that the attachment already effected in E.P.No.295 of 1979 in C.S.No.28 of 1964 may be continued pending disposal of the O.S.Appeal so that they may be able to realise the amount that decrees in the O.S.Appeal so that they the first respondent may dispose of the property attached, by sale.

3. This petition is resisted by the first respondent, son of Varadaraja Pillai, who says that this petition is the second of its kind as the earlier petition in C.M.P.No.9096 of 1984 for attachment before judgment was dismissed on merits, that the learned single Judge, after taking into consideration all the documentary evidence fixed the mesne profits at the rate of Rs.6,250/- per month, that the appellants have attached this theatre, Central Talkies, and the unfinished theatre and that he has deposited the entire decree amount in E.P.No.113 of 1982 and the E.P. has been closed and no amount is

due in respect of the decree passed on 26-4-1977. The first respondent further says that the claim of the plaintiffs at the rate of Rs.12,000/- per month is a tall claim and that there are no merits in the appeal. It is further stated that the entire decree amount has been paid and full satisfaction of the decree has been recorded and that the allegation that he is proposing to sell the property is not true.

4. Mr.Shama Doss, learned Counsel for the petitioners stated that the attachment can be made in the interest of justice under four provisions of law and they are (1) Order 38, rule 5, C.P.C.; (2) Order 21, Rule 42, C.P.C.; (3) section 94, C.P.C.; and (4) section 151, C.P.C. We must at the outset say that the affidavit filed by the 14th appellant is rather dubious. He has not disclosed the fact that full satisfaction of the decree has been recorded. If full satisfaction was recorded after the filling of this petition, the same could have been brought to our notice by a separate memo or an affidavit. That was also not done. The petitioners cannot invoke Order 38, rule 5, C.P.C., as the petition already filed in C.M.P.No.9096 of 1984 for attachment before judgment, has been dismissed by this Court earlier. Further, Order 38, rule 5, C.P.C. applies in terms to suits. The petitioners cannot invoke the aid of section 141, C.P.C. which is to the effect that the procedure provided in the Code with regard to suits can be followed, as far as it is made applicable, in all proceedings in any Court of Civil Jurisdiction. Section 141 applies only the procedure under the Code to other proceedings in the Court of Civil Jurisdiction and not substantive rights. In *Philips v. Philips*, (1910) I.L.R.37 Cal.613 a single Judge of Calcutta High Court held that an order for attachment before judgment is a matter of relief and not of procedure. Pugh, J. observed:

> "I think it is purely a matter of relief to ask to be allowed to seize a man's property without having a decree on the off-chance that you may get a decree hereafter, and it seems to me to have nothing whatever to do with procedure. The way in which a decree is executed, after you have obtained it, is a matter of procedure; but to give one man a right to come to Court before he gets a decree is to confer a right upon him, and that is not procedure."

It therefore follows that the petitioners cannot invoke the provisions of section 141 of the Code of Civil Procedure and consequently the petitioners cannot seek the relief under Order 38, rule 5, C.P.C.

5. The next contention of the learned counsel for the petitioners is that the Court can direct the respondents to furnish security or order the attachment of any property in order to prevent the ends of justice from being defeated. In fact the petitioners invoke the provisions of section 94(b) of the Code of Civil Procedure. Section 94(b) runs thus:

> "In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed.
> (a) x x x
> (b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property;
> (c) x x x
> (d) x x x
> (e) x x x

The Supreme Court in *Manoharlal v. Seth Hiralal*, A.I.R.1962 S.C.527 had to consider the effect of the expression it is so prescribed" in section 94, C.P.C. when a question arose for decision before it, whether a Court can issue a temporary injunction in the circumstances which are not covered by Order 39, C.P.C. The majority view was that there being no such expression in section 94 which expressly prohibits the issue of a temporary injunction in the circumstances not covered by

the provisions of Order, if the Court is of the opinion that the interest of justice requires issue of such interim injunction. This decision of the Supreme Court relates to grant of temporary injunction. Even assuming that the observations in the judgment may be applied to other orders referred to in section 94, we are of the view that the interest of justice does not require attachment of properties of the respondents, for the respondents are possessed of enough properties. The theatre, Central Talkies, is a very big theatre with a seating capacity of 996 seats with cinema equipment and furniture. The first respondent in his counter has stated that he is constructing another theatre adjacent to his theatre and he has completed almost 3/4 of the work. He denied the suggestion that he is negotiating for sale of his properties to one Dr.Karunanidhi. Even assuming that the appellants succeed in the appeal, either partially or fully, it would not be difficult for them to realise the amount from the respondents, who own a very valuable property which is now sought to be attached.

6. The caption in the Judge's Summons shows that the petitioners have invoked the provisions of Order 21, rule 42, C.P.C. also. Order 21, rule 42, C.P.C. provides that where a decree directs an inquiry as to rent or mesne profits or any other matter, the property of the judgment-debtor may, before the amount due from him has been ascertained, be attached, as in the case of an ordinary decree for the payment of money. In this case, an enquiry into mesne profits has been made. The learned single Judge has "fixed" the mesne profits payable by the defendants to the plaintiffs as the rate of Rs.6,250/- per month. The amount has been ascertained. The property of the respondents was sought to be sold in execution of this decree and the respondents have paid the entire amount due under the decree and full satisfaction of the decree has been recorded. Order 21, rule 42, Civil Procedure Code, authorises attachment for mesne profits before the amount of such profits has been ascertained. The petitioners now want to attach the property for realisation of any amount that may be granted to them in appeal. In our view, to such proceedings, Order 21, rule 42, C.P.C. is not applicable.

7. The only question that remains to be considered is whether section 151, Civil Procedure Code should be invoked. It is well-settled that the inherent powers are to be exercised by the court in very exceptional circumstances for which the Code lays down no procedure. In this case, the prayer of the petitioners for attachment before judgment made earlier in C.M.P.No.9096 of 1984 has been negatived. It was also found that it is not expedient in the interest of justice to attach the properties pending disposal of the appeal. As we have already negatived the claims of the petitioners for attachmnent on other grounds also, we do not see any reason to invoke the inherent powers of this Court to attach the property. It should also be noted that the order of attachment could not be said to be an order necessary in the interest of justice or to prevent the abuse of the process of the Court. We therefore decline to invoke the inherent powers of this Court under section 151, Civil Procedure Code.

8. For the foregoing reasons, the petition deserves to be and is hereby dismissed with costs.

R.S. ---- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *S.Mohan and S.Swamikkannu, JJ.*

*A.S.No.199 of 1977. 12*th June*, 1984.

S.K.Panchaksharam Mudaliar (Died) and others *Appellants**

v.

T.V.Kanniah Naidu and others *Respondents.*

(A) Suit for specific performance - Deed - Alteration in document after execution by insertion of provision for eviction of tenant - Interpolation if material - Effect of such alteration.

(B) Agreement of sale - Readiness and willingness - Determination of.

Held:- In this case an examination of the document clearly shows that there is a material alteration since the right of the first defendant is affected by the insertion of words casting an obligation on him that only when the statutory tenant was evicted from an item of the property to be sold the sale could be executed. This acts prejudicially to the first defendant. It has to be noted that in this connection that the agreement stipulated a period of four months for completion of the transaction. Therefore only with a view to avoid his liability under the contract such a condition had come to be interpolated. The fact there was no plea in the written statement that there was an interpolation would not matter at all because even a casual look at the document is clearly suggestive of the material alteration.
[Para.11]

In this case a reading of the entire letter concerned clearly indicates the of the plaintiff. He states therein categorically that because of the difficulties encountered from the fourth defendant he had to think twice about registration. Therefore he cannot put a rider as to the eviction of the fourth defendant and yet say that he was ready and willing to perform his part of the contract. Besides, at a point of time the plaintiff said that he was willing to purchase the property even though the fourth defendant was not evicted. Therefore on this aspect also. The plaintiff was never ready and willing to perform his part of the contract.
[Para.12]

Cases referred to:-

Kalianna Gounder v. Palani Gounder, (1970)2 M.L.J. (S.C) 19= (1970)2 An.W.R. (S.C.)19= (1970)2 S.C.J.18= (1970)2 S.C.R.455= A.I.R.1970 S.C.1942; *Loonkaran Sethia v. Ivan E.John*, (1977)1 S.C.C.379= (1977)1 S.C.R.853= A.I.R.1977 S.C.336; *Nathu Lal v. Mt. Gomti*, L.R. (1940) 67 I.A.318= (1941)1 M.L.J. 204= A.I.R.1940 P.C.160.

T.R.Rajagopalan, for Appellants.

R.Shanmugam, for Respondents.

The Judgment of the Court was delivered by

Mohan, J.:- The plaintiff having lost in his suit O.S.No.55 of 1975 on the file of the Sub Court, Tirupattur, North Arcot has come up by way of this appeal. The suit was for specific performance of the agreement dated 26-2-1974, Exhibit A-1 between the plaintiff and the first defendant. The suit properties consisted of several parcels of land. Item No.1, 1 acre 11 cents, 61 cents and item No.2, 1 acre 95 cents, item No.3, 6 cents, item No.4, 61 cents and item No.5, 58 cents. The consideration for sale was fixed at Rs.42,500/- of which Rs.2,500/- was paid as advance on the date of agreement. Four months time was stipulated. It is common case that the fourth defendant was a tenant under the first defendant, the owner of the property, regarding item No.1. The plaintiff claims in his plaint that he was the tenant of items No 2 to 5. It may be stated even at this stage that we are not called upon to decide the character of his possession in the suit for specific performance. It is also necessary to state that as regards suit Item 1, the mother of the first

defendant namely the third defendant has a life estate with the vested remainder in favour of the first defendant. Under Exhibit A-2 dated 4-7-1974, the first defendant wrote a letter to the plaintiff calling upon him to complete the sale transaction since he was in urgent need of money which he had to pay to his (D-1's) brother. To this a reply was issued by the plaintiff under Exhibit B-1 dated 9-7-1974 wherein it was stated by him that the fourth defendant was in enjoyment of the property and that it looked as if he is not going to vacate the property and, therefore, he had to think about registration. However, it was added that soon after he obtains the necessary funds within a week thereof, he would meet him in person. There was further exchange of letters under Exhibit B-2 dated 11-7-1985 and Exhibit A-5 dated 11-7-1975. Under Exhibit B-4 dated 15-7-1975 the first defendant and the third defendant jointly executed a sale of the properties in favour of the second defendant for a sum of Rs.45,000/-. Thereupon, under Exhibit A-6 dated 16-7-1975, a suit notice was issued by the plaintiff to which replies were issued under Exhibits A-7 and A-8 by the contesting defendants namely the first and second defendants. It was under these circumstances the suit came to be filed as aforesaid for the relief of specific performance.

2. In defence *inter alia* it was contended that a material alteration has been made by the plaintiff in the suit agreement regarding evicting the fourth defendant and executing the sale. The plaintiff was never ready and willing to perform his part of the contract. In any event the second defendant was a *bona fide* purchaser for value without notice of the suit agreement. On these pleadings the following issues came to be framed:

(1) Whether time was the essence of the agreement for sale as contended by the defendants?

(2) Was there an agreement to deliver this possession as contended by the plaintiff?

(3) Was plaintiff ready and willing to perform his part of contract?

(4) Was the first defendant in default in this regard?

(5) Whether the second defendant is a *bona fide* transferee for value without notice.

(6) Whether the plaintiff is entitled for specific performance.

(7) To what relief is the plaintiff entitled?

3. On issues 1 to 4 and 6 the learned Subordinate Judge came to the conclusion that there was a material alteration by reason of a subsequent interpolation, and the plaintiff was never ready and willing to perform his part of the contract. On issue No.5 he answered that the second defendant was a *bona fide* transferee for value without notice. On issue No.7 in view of his earlier finding, he dismissed the suit for specific performance.

4. Mr.T.R.Rajagopalan, learned counsel for the appellant urges the following for our consideration. The alteration made in Exhibit A-1 is not a material alteration at all so as to prejudice the rights of the parties. In support of the said contention, reliance is placed on two rulings of the Supreme Court in *Kalianna Gounder v. Palani Gounder*, (1970)2 M.L.J.(S.C.) 19 (1970)2 S.C.J.18= (1970)2 An.W.R. (S.C)19= (1970)2 S.C.R.455= A.I.R.1970 S.C.1942 and *Loonkaran Sethia v. Ivan E.John*, (1977)1 S.C.C.379= (1977)1 S.C.R.853= A.I.R.1977 S.C.336. In so far as there is clear and cogent evidence from P.Ws.2 to 4 that the condition as to evicting the fourth defendant was there even before the party subscribing signature to Exhibit A-1, there is no justification for rejecting their evidence. There was not even a plea in the written statement that there was an interpolation. Therefore the finding that there was material alteration cannot be supported.

5. As regards readiness and willingness, all that was stated in Exhibit A-3 was that soon after funds were obtained by sale of jaggery the plaintiff would meet the first defendant. It is not necessary that he must have the money ready at all material time. It is enough if he expresses unequivocally readiness and willingness to perform the contract. Therefore, to read something more in Exhibit A-3 as was done by the Court below is incorrect. To deny the equitable relief of specific performance on the ground that the plaintiff had put up a false case is again wrong. If really as admitted by the first defendant in his evidence that the understanding between the parties was that if the sale was to be completed delivery of possession could be had from the fourth defendant as well, it cannot be held that the case put forth by the plaintiff was a false case.

6. The finding that the second defendant was a *bona fide* purchaser for value without notice is totally opposed to the evidence on record. It is impossible to believe that wet lands which formed the subject-matter of the suit remained fallow for the second defendant to walk in and take possession. For all these reasons it is prayed that the dismissal of the suit be set aside and a decree be passed for specific performance.

7. Mr. R.Shanmugam, learned counsel for the second defendant (2nd respondent herein) states that this is a clear case of material alteration. The fourth defendant-tenant has a statutory right to remain in possession under the Tamil Nadu Cultivating Tenants Protection Act. If that right is sought to be taken away by an interpolation so as to impose an obligation on the first defendant, to evict him which eviction is impossible except according to law, it does prejudice the rights of parties. Looked at from that point of view the ruling in *Kaliappa Gounder v. Palani Gounder*, (1970)2 M.L.J. (S.C.)19= (1970)2 An.W.R. (S.C.)19= A.I.R.1970 S.C.1942 has no application. Besides the very ruling in *Loonkaran Sethia v. Ivan E.John*, (1977)1 S.C.C.379= A.I.R.1977 S.C.336 states that if there is a material alteration of a document so as to prejudice the rights of the parties, undoubtedly reliance cannot be placed on such a document, nor can rights be enforced on the basis of such an alteration. Therefore, it is submitted that the finding can easily be upheld.

8. As regards readiness and willingness, in Exhibit A-3 it is categorically admitted by the plaintiff that he had to think about the registration in view of the obstacle placed by the fourth defendant. It is in that context the tenor of the letter has to be understood. He cannot put a rider and yet say that he was willing to perform his part of the contract. Undoubtedly the plaintiff came forward with a false case having materially altered the suit agreement, Exhibit A-1. Therefore he not having come with clean hands, is not entitled to obtain equitable relief of specific performance. As far as the second defendant is concerned he is a *bona fide* purchaser for value. He had nothing to do with either of the parties; nor is it the case of the plaintiff that he was ever informed of the suit agreement. When the second defendant wanted to obtain possession by then the fourth defendant had vacated and, therefore, he could easily obtain possession. However, on that score the *bona fides* cannot be denied. Thus none of the findings calls for interference.

9. Having regard to the above submissions, the following points arise for determination:

(1) Is there a material alteration of Exhibit A-1 so as to prejudice the rights of parties?

(2) Was the plaintiff always ready and willing to perform the contract?

(3) Can the denial of equitable relief to the plaintiff be upheld?

(4) Is the second defendant a *bona fide* purchaser for value without notice of the suit agreement?

10. Exhibit A-1 is the suit agreement. The requirement as to evicting Perumal (4th defendant) in the suit agreement undoubtedly has come to be written in a different ink. The learned Subordinate Judge in paragraph 9 of his judgment, after referring to the relevant portion in Tamil states as follows:

> "The disputed two lines are underlined by me. A careful scrutiny of Exhibit A-1 makes it abundently clear that the disputed two lines at the end of the first page of Exhibit A-1 are out of sequence. The spacing is narrow. I do not accept the evidence of P.Ws.1 to 4 that the disputed two lines were written in continuation of the previous lines in the first page and that they were not written after the first defendant signing Exhibit A-1. There is no force in the contention of the learned counsel for the plaintiff that the case of the first defendant is liable to be rejected. The way in which the disputed two lines were written, the close writing which is visible to the naked eye, the efforts taken in writing the same and the different shade in ink give the impression that these recitale should have been written up after Exhibit A-1 was signed by the first defendant."

We have very closely examined the document ourselves. We find absolutely no difficulty in concurring with the finding of the learned Subordinate Judge which we have stated above. The text as originally written alone will fit in with the succeeding line occurring in page 3 of the document. The interpolation concerning evicting Perumal and thereafter executing the sale does not fit in at all is that context, leave alone the manner in which it is written, which is clearly suggestive of subsequent writing after the document had come to be executed. When the document is so clear, it is not necessary at all to deal with the evidence of P.Ws.2 to 4. Even otherwise, we have not the sligtest hesitation in rejecting their evidence as false contrary to the tener of the document as it is visible even for a casual look. As to the law of material alteration, we need only refer to the decision in *Loonkaran Sathia v. Ivan E.John*, (1977)1 S.C.C.379= (1977)1 S.C.R.853= A.I.R.1977 S.C.336. At page 347 it is stated:

> "Question No.5:- Before proceeding to determine this question, it would be well to advert to the legal position bearing on the matter. As aptly stated in paragraph 1378 of Volume 12 of Halsbury's Laws of England (Fourth Edition), 'if an alteration (by erasure, interlineation or otherwise) is made in a material part of a deed, after its execution, by or with the consent of any party to or person entitled under it, but without the consent of the party or parties liable under it, the deed is rendered void from the time of the alteration so as to prevent the person who had made or authorised the alteration, and those claiming under him, from putting the deed in suit to enforce against any party bound by it, who did not consent to the alteration, any obligation, covenant or promise thereby undertaken or made.
>
> A material alteration, according to this authoritative work, is one which varies the rights, liabilities, or legal position of the parties as ascertained by the deed in its original state, or otherwise varies the legal effect of the instrument as originally expressed, or reduces to certainty some revision which was originally unascertained and as such void, or which may otherwise prejudice the party bound by the deed as originally executed..
>
> The effect of making such an alteration without the consent of the party bound is exactly the same as that of cancelling the deed."

11. To the same effect are the observation made by the Privy Council in *Nathu Lal v. Mt., Gomti*, (1940) 67 I.A. 318= (1941)1 M.L.J.204= A.I.R.1940 P.C. 160. In that case, after referring to

the material alterations made in the document, the matter was concluded thus:

"As the above mentioned alterations substantially vary the rights and liabilities as also the legal position of the parties, they cannot be held to be anything but material alterations and since they have been made without the consent of the defendants first set, they have the effect of cancelling the deed."

So examined, this is a material alteration since the right of the first defendant is affected. In the State of Tamil Nadu we have the Tamil Nadu Cultivating Tenants Protection Act 25 of 1955. Under section 3 of the Act no tenant can be evicted even in execution of a decree or otherwise except on the grounds stated in the Act. Therefore the right of the tenant is a statutory right. If an obligation is cast on the first defendant that only when the statutory tenant is evicted the sale could be executed, that acts prejudicially to the first defendant. It has to be noted in this connection that the agreement stipulated a period of four months for completion of the transaction. Therefore, only with a view to avoid his liability under the contract such a condition had come to be incorporated as stated above after the execution of the document. In such a case no doubt this cannot but be a material alteration. In *Kalianna Gounder v. Palani Gounder*, (1970)2 M.L.J.(S.C.): 19 (1970)2 An.W.R. (S.C.) 19= A.I.R. 1970 S.C.1942 the position was entirely different. There the interpolation was "to clear the debts and execute the sale deed free from encumbrances." That undoubtedly is a statutory duty cast upon every vendor under section 55 of the Transfer of Property Act. Therefore their Lordships of the Supreme Court held that it cannot be regarded as a material alteration. But there is a great difference in that the statutory right of the fourth defendant had to be abrogated by requiring the first defendant to evict him and then alone complete the sale. We may now extract the head-note of *Kalianna Gounder v. Palani Gounder*, (1970)2 M.L.J. (S.C.)19= (1970)2 An.W.R. (S.C.)19= A.I.R.1970 S.C.1942 to highlight our point:

"A material alteration is one which varies the rights, liabilities or legal position of the parties as ascertained by the deed in its original state, or otherwise varies the legal effect of the instrument as originally executed, o reduces to certainty some provision which originally was unascertained and as such void or may otherwise prejudice the party bound by the deed as originally executed.

As alteration made in a deed, after its execution, in some particular which is not material does not in any way affect the validity of the deed; an alteration is not material which does not vary the legal effect of the deed in its original state but merely expresses that which was implied in law in the deed as originally written, or which carries out the intention of the parties already apparent on the face of the deed, provided that the alteration does not otherwise prejudice the party liable thereunder.

Nathu Lal v. Mst., Gomti, (1940)67 I.A. 318: (1941)1 M.L.J.204 (P.C.): A.I.R.1940 P.C.160. Halsbury's Laws of England, 3rd Edition, Volume II, Article 599, page 368 and Article 604, page 370 and 371), referred to.

"The plaintiff, on 4th July, 1956, agreed to purchase the land of the defendant for Rs.12,000/-. A memorandum reciting that Rs.2,000/-, was paid as advance by the plaintiff to the defendants was executed by the parties. The defendants having resiled from the agreement, the plaintiff sued the defendant for specific performance of the agreement, depositing the balance consideration in Court.

The defendants pleaded *inter alia* that the agreement was materially

altered by the plaintiff without their consent after it was executed by the addition of the words "clear debts and execute the sale deed free from encumbrances" and the suit therefore was not maintainable.

These words occurred immediately before the Schedule of property sold and after the covenants of the momorandum.

The Court held on the evidence that the words were there even in the original state and were not inserted later. It was admitted that there was no discussion or at the time of the writing and execution of the agreement about the encumbrances on the land, nor was any evidence let in to show that there were any encumbrances subsisting on the land.

Held:- Ordinarily when property is agreed to be sold for a price, it would be the duty of the vendor to clear it of all encumbrances before executing the sale deed. Since the defendants were liable to clear the encumbrances, if any, subsisting on the land, assuming that the covenant was incorporated after the execution of the deed, it cannot be regarded as a material alteration on that account, as it did not alter the rights or liabilities of the parties or the legal effect of the document."

For these reasons, we hold that the contention advanced on behalf of the appellant that this is not a material alteration has to be rejected. The fact there was no plea in the written statement that there was an interpolation would not matter at all because even a casual look at the document is clearly suggestive of the material alteration.

What D.W.1 in evidence says is that the understanding between the parties was that after the completion of sale the first defendant was willing to obtain possession from the fourth defendant. But this cannot be construed as meaning that the first defendant would evict the fourth defendant after which event alone the sale can be concluded. For all these reasons we have not the slightest hesitation in holding that the interpolation is a material alteration acting to the prejudice of the first defendant and therefore the plaintiff cannot enforce his right on the suit agreement, Exhibit A-1.

12. As regards readiness and willingness, as rightly contended by the learned counsel for the second respondent it is not a mere innocuous statement that he will complete the sale by the funds received by sale of jaggery. On the contrary a reading of the entire letter clearly indicates the mind of the plaintiff. He states therein categorically that because of the difficulties encountered from the fourth defendant he had to think twice about registration. Therefore he cannot put a rider as to the eviction of the fourth defendant and yet say that he was ready and willing to perform his part of the contract. Besides, at as point of time the plaintiff said that he was willing to purchase the property even though the fourth defendant was not evicted. Therefore, on this aspect also, we uphold the finding of the learned Subordinate Judge.

13. Having regard to the above finding it follows that the plaintiff had come forward with a false case as though the suit agreement contains a clause as to the eviction of the fourth defendant which we have categorically found to be a material alteration. By reason of the fact that he had come forward with a false case and unclean hands, he had denied himself the equitable relief of specific performance. Accordingly we answer question No.3 that the equitable relief of specific performance has been rightly denied to him.

14. In view of the above it does not matter very much whether the second defendant is *bona fide* purchaser or not. However, there is no evidence on record to show that the second respondent was aware of the suit agreement; nor did plaintiff put him on notice

of the same at any point of time. The fact that immediately after Exhibit A-5, Exhibit B-4 sale in favour of the second defendant has taken place is not strong enough to hold that there are no *bona fides* on his part.

15. In view of the above, we conclude that there are no merits in the appeal and the same will stand dismissed with costs of the contesting second defendant.

R.S. ----- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *S.Mohan, J.*

*Appeal No.336 of 1979. *31st January,* 1985.

Gomathi Ammal (died) and others *Appellants**

v.

Madasamy and others *Respondents.*

Tamil Nadu Hindu Religious and Charitable Endowments Act (22 of 1959), Section 6 (16) - Religious Charity - Dharmam done in the chavady of a house which is private in the absence of any dedication not "religious charity".

Held:- In so far as charity is done in the chavady of a house which is purely private and there has been no dedication, it will not come within 'religious charity' as defined in section 6 (16) of the Tamil Nadu Hindu Religious and Charitable Endowments Act. Merely because of Arunachalapuranam being read and feeding of those assembling in the chavady being done on a particular day it will not acquire the character of a public charity. The character of a trust having come to be established as private, it cannot be displaced in the absence of strong and cogent evidence to the contrary.
[Para.11]

Cases referred to:-

Commissioner, Hindu Religious and Charitable Endowments, Madras v. Narayana Ayyangar, (1965)2 S.C.J.431: (1965)2 An.W.R. (S.C.) 47: (1965)2 M.L.J. (S.C.) 47: (1965)3 S.C.R.168: A.I.R.1965 S.C.1916; *Radhakrishna Chettiar v. Hindu Religious and Charitable Endowment Department,* (1960)1 M.L.J.494: (1960) M.W.N.198; *Executive Officer, S.R.Devasthanam v. Sesha Iyengar Trust,* (1979)2 M.L.J.280; *Pichai v. Commissioner, H.R. and C.E.,* (1971)1 M.L.J. 166: A.I.R.1971 Mad.405.

Appeal against the Judgment and Decree of the Court of the Second Additional Subordinate Judge, Tirunelveli dated 13-10-1977 and made in O.S.No.52 of 1976.

N.Veluswami, for Appellant.

The Court delivered the following

JUDGMENT:- Defendants 2 to 6 are the appellants before me in this appeal. This arises out of O.S.No.52 of 1976 which is a statutory suit for cancellation of the order passed by the Commissioner, H.R. and C.E., Madras in A.S.P.No.85 of 1975 dated 27-6-1976 and for further declaration that Sri Harihara Arunachaleswarar Karthikai Guru Pooja Dharma, Veekrakaralampudur, Tenkasi Taluk is a private trust of the plaintiff.

2. The plaint averments are as follows: Plaintiffs 1 to 3 are the children, while the fourth plaintiff is the wife of one Arunachalam Asari. The said

Arunachalam Asari, as the tr stee with full right to the endowed properties succeeded his father and he has been performing the dharmam known as Sri Hara Arunachaleswarar Karthikai Guru Pooja Dharmam. The endowment has been founded by one Nainar Asari by a registered deed of endowment dated 17-4-1925 and the object of the endowment was the performance of Guru Pooja on the Thirukarthikai day in the Chavady of the house of the said Nainar Asari. The founder named himself as a trustee along with his mother and thereafter the succeeding trustee assumed the management of the trust by nomination, which was so provided in the deed of endowment dated 17-4-1925. There were several proceedings in relation to the endowed properties. Finally, it was decided that Arunachalam Asari and his ancestors were the hereditary trustees of the above Dharmam. Defendants 2 and 3 are the wife and son respectively of one Somasundaram Asari. The said Somasundaram Asari and his brother, Paramasivam Asari have filed a suit in O.S.No.32 of 1957 for framing a scheme in respect of this endowment. Arunachalam Asari died pending that suit. The plaintiffs were impleaded as defendants 8 to 11 in that suit as his legal representatives. After contest, the suit was dismissed on 22-12-1960. Therefore, the plaintiffs therein, Somasundaram Asari and Paramasiva Asari, preferred A.S.No.90 of 1961 on the file of the District Court, Tirunelveli. The said appeal was also dismissed on 30-8-1961. Thereafter, Somasundaram Asari has set up his wife and son to file an application before the Deputy Commissioner of Hindu Religious and Charitable Endowments Department, Madurai in O.A.No.34 of 1966 by joining defendants 3 to 6 and another under sections 63(a) and 64(1) of the Tamil Nadu Act 22 of 1939 for declaration that Arunachaleswarar Dharmam is a religious institution. There was a further prayer relating to the framing of a scheme for the endowment and administration of the same. These were resisted on several grounds. The Deputy Commissioner, by his order dated 9-2-1972 held that there was no temple as Sri Hara Arunachaleswarar temple and the properties have been endowed for the performance of Sri Hara Arunachaleswarar Karthigai Guru Pooja Dharmam on Thirukarthikai day and the Guru Pooja consists of performance of Pooja and the reading of Arunachaleswarer Puranam and feeding. Aggrieved by this order, the matter was put up in appeal in A.P.No.85 of 1974. That appeal was dismissed. Hence the present suit.

3. The first defendant in his written statement contended that the reading of Arunachalapuranam and feeding are objectives of public charity. That order is correct. So far as the earlier suit is concerned, viz., O.S.No.32 of 1957, this defendant was not party to that suit.

4. The appellants herein, as defendants 2 to 6, resisted the plaintiffs' claim stating that Nainar Asari started the Dharmam nine days before Thiru Karthigai day every year in the Chavady of his house by reading Arunachalapuranam and doing pooja every day and feeding the public on the 10th day on Thirukarthigai day on a large scale. It was with this object, the properties were endowed by a document dated 17-4-1925. After his death, his widow Kalyaniammal continued to perform the Dharmam till her death. This Dharmam is a public charity. In fact, the plaintiffs, before and after O.S.No.32 of 1957, admitted that the trust is a public trust and performed the Dharmam as a public charity. Hence the plaintiffs are estopped from contending to the contrary. The decisions rendered by the Deputy Commissioner, which were confirmed in appeal by the Commissioner, are perfectly correct and no exception could be taken to the same.

5. On these pleading, the following issues were set down for trial:

1. Whether Sri Hara Arunachaleswarar Karthigai Guru Pooja Dharmam is a private trust and whether the plaintiffs are entitled to the right of manangement of the same?

2. Whether the proceedings in O.A.No.34 of 1966 on the file of the Deputy Commissioner, H.R. and C.E., Department and A.P.No.85 of 1974 on the file of 1st defendant are barred by *res judicata* in view of the findings in O.S.No.32 of 1957 on the file of this Court and A.S.No.90 of 1961 on the file of District Court, Tirunelveli?

3. Whether the suit is barred by time?

4. Whether the plaintiffs are entitled to the reliefs as prayed for?

5. To what relief, are the plaintiffs entitled?

6. Learned Subordinate Judge of Tirunelveli, on a consideration of the oral and documentary evidence on Issues 1 and 2, came to the conclusion that the finding of the Commissioner that the trust is a public one and the Dharmam is a public religious charity is not correct, that the proceedings in O.A.No.34 of 1977 and A.P.No.85 of 1974 are not barred by *res judicata* in view of the findings is O.S.No.32 of 1957 on the file of Sub Court, Tirunelveli and A.S.No.90 of 1961 on the file of the District Court, Tirunelveli and that the Dharmam in question is a private trust and the plaintiffs are entitled to the right of the management of the same. Thus, he found Issue No.1 in the affirmative and Issue No.2 in the negative. As regards limitation, it was answered that the suit is not barred by limitation. On Issue No.4 it was concluded that the plaintiffs were entitled to a decree for cancellation of the order dated 27-6-1975 passed by the first defendant in A.P.No.85 of 1974. Consequent to these findings, under Issue No.5 the suit was decreed as prayed for. Aggrieved by this judgment and decree, defendants 2 and 6 have come up in appeal.

7. It is the contention of Mr.M.Veluswami, learned counsel for the appellants that under section 6(16) of the Tamil Nadu Act 22 of 1959, 'religious charity' need not be connected with a math or temple as has been wrongly assumed by the court below. It is enough if it is associated with a Hindu festival or observance of a religious character. As a matter of fact, the point came up for consideration before the Supreme Court in *Commr.H.R. and C.E. v. Narayana*, (1965)2 S.C.J.431= (1965)2 An.W.R. (S.C.)47= (1965)2 M.L.J. (S.C.) 47= (1965)3 S.C.R.168= A.I.R.1965 S.C.1916. Therefore, if on a religious festival day or on a day, which is a part of religious, namely Thirukarthigai day, the feeding is done to the general public it will fall within the definition of section 6(16). Similar is the view taken in *Radhakrishna Chettiar v. Hindu. Religious and Charitable Endowment Department*, (1960)1 M.L.J.494= (1960) M.W.N.198. In *Executive Officer, S.R.Devasthanam v. Sesha Iyengar Trust*, (1979)2 M.L.J.280, the question of mandagapadi came up for consideration. The court below is wrong in concluding that there must be an idol to constitute a temple. There is no need for an idol, as evident from the decision reported in *Pichai v. Commissioner, H.R. and C.E.*, (1971)1 M.L.J.166: A.I.R.1971 Mad.405. Besides, the court below erred in assuming that there has been no dedication. On the contrary, the authorities constituted under the Tamil Nadu Act 22 of 1959 clearly held as to the nature of charity. Unless and until there is evidence to the contrary, those orders cannot be set aside.

8. Learned Government Pleader also supports the stand of Mr.M.Veluswamy.

9. Learned counsel for the respondents/ plaintiffs would contend that first and foremost there is no public charity at all inasmuch as there is no dedication to the public. There is no public nature involved in the Dharmam contained in Exhibit A-3. The mere distribution of prasadam on a particular day after reading Arunachalapuranam would not constitute a public charity. The partaking of public is utterly lacking. Therefore, none of the authorities cited by the appellant can advance his case. Besides, the order of the Deputy Commissioner, as evidenced by Exhibit B-1, would clearly show that there is no

temple as Arunachaleswarar or Lingam in the Chavady. All these aspects came up for consideration in O.S.No.32 of 1957, where it was held that the trust in question is a private trust. That judgment rendered by the learned Subordinate Judge, as evidenced by Exhibit A-4 was confirmed by the learned District Judge of Tirunelveli in A.S.No.90 of 1961 vide Exhibit A-5. Therefore, the matter is no longer *res integra*. From this point of view, no exception can be taken to the finding of the trial court.

10. Having regard to the arguments, the one and the only question that arises for my consideration is whether Sri Hara Arunachaleswarar Karthigai Guru Pooja Dharmam would fall within the definition of 'religious charity' under section 6(16) of the Tamil Nadu Act 22 of 1959.

11. In order to appreciate these aspects, firstly I have to refer to Exhibit A-3. In Exhibit A-3, there is absolutely no mention about the religious charity. All that it states is that in the house of Nainar Asari there has been established Sri Arunachaleswarar for which Karthigai Guru Pooja Dharmam has been performed. It further states that in the Chavady of the house, every year on Thirukarthigai day Dharmam is performed and that shall be continued. As to what exactly was the nature of dharmam can be culled out from Exhibit A-4, which is the judgment rendered in O.S.No.32 of 1957 on the file of the Sub Court, Tirunelveli, learned Subordinate Judge, by judgment dated 22.12.1960 on an elaborate consideration came to the following conclusion on Issue No.1 viz., whether the trust in dispute is a public one and whether the suit is not maintainable without sanction as alleged? In paragraph 16 of the judgment, this aspect has been dealt with. He held, after referring to Exhibit B-3 in that case, which is Exhibit A-3 in the present case, dated 17-4-1925 as follows:-

"Exhibit B-3 dated 17-4-1925 is the registration copy of the endowment document. The document recites that Dharmam was being performed by the ancestors of Nainar Achari II who continued to do the same and Dharmam was being performed in the Western Chavadi. There is no mention therein about any public nature of the Dharmam. According to the evidence of P.W.1 at the most a sum of Rs.100/- was spent prior to 15 years ago but for the past 15 years after the 1st defendant took charge, at the rate of Rs.25 per year. But the witness on the side of the defendants spoke to the fact that only a sum of Rs.25/- was spent for Neivedyam and there was no feeding. From the income that was spent, obviously it could not be a public trust. P.Ws. 1 to 3 deposed that it was only open to the relatives in their caste and not to the general public. But the witnesses on the side of the defendants stated that the general public also took part. It might be that some outsiders would have come and taken part of the pooja and there is nothing to show that they have right in it. The 1st defendant's father did not make mention about the public nature of the trust in O.S.No.355 of 1955 on the file of the District Munsif's Court, Tenkasi, P.W.1's wife sent notice to the 1st defendant under Exhibit B-18 dated 25-2-1957. The 1st defendant sent a reply under Exhibit B-19 dated 15-3-1957. It is significant there was no mention at all about the public nature of the trust. It appears that the present plea of the public trust is only an after-thought solely for non-suiting the plaintiffs on that ground, because section 92 is a bar, in the absence of a sanction from the Advocate General. So, in the circumstances, I find the trust is a private trust and not a public trust and section 92 a had no application."

It was this judgment which was taken up in appeal by the plaintiffs, viz., Somasundaram Achari and Paramasivam Achari. Learned District Judge, by its judgment dated 30-8-1961 confirmed the judgment, as seen from Exhibit A-5.

It was after this, the proceedings under section 63-A of the Tamil Nadu Act 22 of 1959 took place. The Deputy Commissioner, H.R. and C.E. Madurai held as follows:

"I have already found that the suit trust is a public religious charity, but not connected with any temple or math. Though it would consitute as a specific endowment still it is not a specific endowment attached to any temple. I am of the view that section 64(1) of the Tamil Nadu Act 22 of 1959 may not enable the Deputy Commissioner to settle a scheme for the proper administration of the suit trust. It is a lacuna in the Act. In the result, I find that the suit trust is a religious institution as defined in the Tamil Nadu Act 22 of 1959 and that section 64(1) of it may not enable the Deputy Commissioner to settle a scheme of administration for it."

In this view, he partly allowed the application and partly dismissed the same. One thing that is very essential to notice is that he held in unequivocal terms that on the evidence on record there was a temple, by name Arunachaleswarar. However, he came to the conclusion that though the charity is not connected with any math or temple, there is reading of Arunachalapuranam and also feeding, and that both seem to be the objects of public charity. Therefore, he held that it was a religious charity within the meaning of section 6(16). It was this aspect which was confirmed by the Commissioner in A.P.No.85 of 1974, as seen from Exhibit A-1. Section 6(16) of the Act defines 'religious charity' as follows:

" 'Religious charity' means a public charity associated with a Hindu Festival or observance of a religious character, whether it may be connected with a math or temple or not."

This clause came up for consideration in *Commissioner, H.R. and C.E. v. Narayana*, (1965)2 S.C.J.431= (1965)2 An.W.R. (S.C.)47= (1965)2 M.L.J. (S.C.)47= A.I.R.1965 S.C.1916. In this case, the question was whether the feeding of Brahmins on Rathotsavam day of Sri Prasanna Venkitachalapathiswami Shrine would constitute religious charity. In paragraph 5 at page 1918, the Supreme Court observed thus:

"We are unable to agree with the view so expressed by the High Court. The expression 'associated' in section 6(13) of the Act 19 of 1951 issued having regard to the history of the legislation, the scheme and objects of the Act, and the context in which the expression occurs, as meaning "being associated with' or "in relation to." The expression does not import any control by the authorities who manage or administer the festival. A Hindu religious festival or observance may have a local significance that it is celebrated or observed in a particular locality in connection with a shrine, temple or math, or it may be a festival or observance celebrated generally without any connection with any temple or math. In the case of such general festivals or observance there is no one who can be so said to control the celebrations, and the definition of "religious charity" includes such general festivals and observance. It cannot be assumed that there must always be a set of persons who control the celebration of a festival or an observance. The test suggested by the High Court that in order that there should be between the charity and the festival or observance, such a relation that the administration of the charity must be controlled by those who celebrate the festival or observance in a temple or math, besides being inapt in the case of general festivals and observances can only be involved if words which are not found in the definition of "religious charity" are added thereto".

To the same effect are the other rulings cited by the learned counsel

for the appellant, Mr.M.Veluswamy. In *Pichai v. Commissioner, H.R. and C.E.*, (1971)1 M.L.J.166= A.I.R.1971 Mad.405, it was held:

> " The definition of "temple" is so comprehensive as to include any place irrespective of installation of idols or a building or tower, dwajasthambham or a stupi. It is not necessary in all cases that the presence of idols is an essential requisite to bring the place within the definition of "temple" under the Act."

But these rulings do not, in my considered view, help the appellant in any manner. Already, the definition of 'religious charity' has been noted. In so far as dharmam is done in the chavady of a house, which is purely private and as rightly held by the learned Sub Judge that there has been no dedication, it will not fall under section 6(16), merely because Arunachalapuranam is read and feeding is done on a particular day, it cannot partake the character of a public charity. In fact, as rightly observed by the learned Subordinate Judge, the feeding of those who assembled in the Chavady by giving prasatham cannot be considered as public charity. This is where the Deputy Commissioner, H.R. and C.E. as seen from Exhibit B-1 order, committed the mistake. A private character of a trust has already come to be established in O.S.No.32 of 1957 (Exhibit A-4) to which also a reference has been made. That has been confirmed by the District Judge, Tirunelveli. Therefore, the character of a trust having come to be established as private, unless there is a strong and cogent evidence to hold to the contrary, which evidence is certainly lacking in this case, I see no warrant for disturbing the finding of the learned Subordinate Judge.

12. In the result, the appeal fails and is hereby dismissed. However, there will be no order as to costs.

R.S. ----- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *G.Maheswaran, J.*

*S.A.No.1864 of 1979. *21st December, 1984.*

Arunachalam and Co., and others *Appellants**

v.

M.Sadasivam *Respondent.*

(A) Partnership Act (IX of 1932), section 43 - Partnership at will - Essential requirements - Suit for dissolution of partnership at will - Absence of notice of dissolution - Whether precludes maintainability of suit.

(B) Partnership Act (IX of 1932), section 69 - Whether plea of suit not being maintainable can be raised for the first time in second appeal.

The two essential conditions of a partnership at will are:- The deed of Partnership should not contain any provisions whether express or implied (1) as to the duration of the partnership, (2) for the determination of the partnership. If these two provisions are absent or cannot be implied, the partnership will be one at will.

In this case a reference to the deed of partnership shows that the duration of partnership is fixed as three years and thereafter the partnership should be a partnership at will. As there is a clear indication that the defendants wanted to continue the partnership after the expiry of the initial period, it would be reasonable to conclude that it is a "partnership at will" as it continued to carry on business after the expiry of the initial period. The provisions contained in section 43 of the Partnership Act do not control the other provisions of Chapter VI and it is possible to have partnership of a firm dissolved even when no notice in writing has been given as required under section 43. *[Para.8]*

In this case the appellants cannot plead for the first time in second appeal that section 69 of the Partnership Act is a bar to the maintainability of the suit by the plaintiff. *[Para.15]*

Cases referred to:-

Lilabatt Rana v. Lalit M.Mohan Dey, A.I.R.1952 Cal.496; *Banarsi Das v. Seth Kanshi Ram*, (1964)1 S.C.R.316: A.I.R. 1963 S.C.1165; *Chaimanram v. Ganga Saha*, A.I.R.1961 Orissa 94; *Mohammed Ali v. Kondho Rayaguru*, A.I.R.1945 Patna 286; *Kalyan Sahai v. Firm Lachminarain*, A.I.R.1951 Raj.11.

M.Velusami, for Appellants.

G.Masilamani, for Respondent.

The Court delivered the following

JUDGMENT:- Defendants are the appellants. The suit out of which the second appeal arose, was filed by the plaintiff-respondent for rendition of accounts or in the alternative for dissolution of partnership. Defendants 2 to 4 and the plaintiff entered into a partnership agreement on 9-7-1970 for carrying on 'commission business' in chillies, ground-nuts and onion. The plaintiff contributed Rs.19,500/-. Defendants 2 and 3 contributed Rs. 16,250/- each., 4th defendant contributed Rs.13,000/-. The second defendant was managing the affairs of the partnership defendants 3 and 4 joined the first defendant firm on 1-4-1970. The partnership was to continue for three years from 1-4-1970. During the year 1970-71, a net profit of Rs.50,258/- was earned. It was shared in accordance with the terms of the partnership deed and the plaintiff was paid a sum of Rs.15,077/- towards his share. But for the years 1971-72, the plaintiff was paid a sum of Rs.4,302-30. The case of the plaintiff is that the other partners namely defendants 2 to 4 conspired to remove the plaintiff from the partnership business and had manipulated the accounts. The plaintiff's request to provide a true copy of the accounts fell on deaf ears of the other partners and the plaintiff was forced to give a notice through his advocate on 22-1-1973 demanding rendition of accounts for the year 1971-72 for which a reply was sent, which is to the effect that plaintiff and third defendant had agreed to withdraw from the partnership and that the plaintiff had to pay Rs.6,735-11 to the firm and that the plaintiff has agreed to pay the amount within three months. Plaintiff denied these allegations and has filed the suit for reliefs stated.

2. The suit was resisted by the defendants, who is their answer contended that the plaintiff and third defendant had retired from the partnership voluntarily since the plaintiff was disappointed at the low profit made during the year 1971-72 and that the plaintiff has settled his accounts and retired on 31st March, 1972 and that it is only thereafter that 5th and 6th defendant were taken in as partners, and that therefore the plaintiff is not entitled to the reliefs prayed for.

3. The learned Trial Judge found that the plaintiff has not settled his accounts with the first defendant firm and has not retired from the partnership with effect from 31-3-1972 and that the plaintiff has not been furnished with the copies of the accounts and granted a preliminary decree in favour of the plaintiff for dissolution of partnership and accounting.

4. In appeal the learned Appellate Judge concurred with the findings of the trial court that the plaintiff has not retired from the partnership and also held that want of notice under section 43 of the Indian Partnership Act will not be a bar for maintainability of a suit for dissolution of partnership and in the end dismissed the appeal.

5. The defendants have filed the second appeal and a learned Judge of this court has formulated the following substantial question of law, at the time of admission of the second appeal.

"Whether the suit for dissolution of partnership at will and rendition of accounts, in the absence of a

notice of the dissolution, is maintainable in law."

6. The admitted facts are that the plaintiff was one of the partners along with defendants 2 to 4 and defendants 3 and 4 joined the first defendant firm on 1-4-1970. Exhibit A-6 is the copy of the agreement dated 9-7-1970. The terms of the partnership deed are not disputed and the defendant's claim was that plaintiff voluntarily retired from the partnership on 31-3-1972 and that the accounts were looked into and a document has also been written under Exhibit B-17, which was signed by the other retiring partner, who is the third defendant.

7. A perusal of Exhibit B-17 shows that the plaintiff has not signed in it. Both the Courts did not believe that there was panchayat, that the accounts were looked into and that the plaintiff retired from the partnership. Both the Courts concurrently held that the plaintiff has not retired from the partnership and this finding of fact is binding in second appeal. But the question as formulated by the learned Judge of this Court was not raised during the trial of the suit. In appeal, the learned Appellate Judge has dealt with the question as to whether the suit for dissolution of the partnership is not maintainable in view of section 43 of the Indian Partnership Act which requires a notice of dissolution.

8. It should be noted that the prayer for dissolution of the partnership is only an alternative prayer in the plaint. Further the question whether the partnership is a partnership at will has not been adverted to. The appellate Court has proceeded on the basis that the partnership is a partnership at will. The two essential conditions of a partnership at will are:

The deed of Partnership should not contain any provisions whether express or implied (1) as to the duration of their partnership; and (2) for the determination of their partnership. If these two provisions are absent or cannot be implied, then the partnership will be at will. Now a reference to Exhibit A-6 shows that the duration of their partnership is fixed as three years from 1-4-1970 and thereafter the partnership should be 'a partnership at will'. As there is clear indication that the defendants wanted to continue the partnership after the expiry of the initial period, it would be reasonable to conclude that it is a 'partnership at will', as it continues to carry on businesses after the expiry of the initial period. In *Lilabatt Rana v. Lalit M.Mohan Dey*, A.I.R.1952 Cal.496, at 499 it has been pointed that the provisions contained in section 43 of the partnership Act do not control the other provisions of Chapter VI and that it is possible to have partnership of a firm dissolved even when no notice in writing has been given as required under section 43.

9. Certain observations in *Banarsi Das v. Seth Kanshi Ram*, A.I.R.1963 S.C.1165: (1964)1 S.C.R.316, will help the plaintiff in this case. The observations are:

> "Even assuming, however, that the term "notice" in the provision is wide enough to include within it a plaint filed in a suit for dissolution of partnership, the sub-section itself provides that the firm will be deemed to be dissolved as from the date of communication of the notice. It would follow, therefore, that a partnership would be deemed to be dissolved when the summons accompanied by a copy of the plaint is served on the defendant, where there is only one defendant, and on all defendants, when there are several defendants. Since a partnership will be deemd to be dissolved only from one date, the date of dissolution would have to be regarded to be the one on which the last summons was served."

10. Therefore there is no difficulty in holding that notice under section 43 had been substantially complied with.

11. The next argument of the learned

counsel for the appellants was that the suit is not maintainable in view of the provisions of section 69(1) of the Partnership Act. According to the learned Counsel or the plaintiff as a partner is prohibited from instituting a suit or enforcing a right arising from a contract unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.

12. It is not disputed that the firm is registered. It is also not disputed that the plaintiff was a partner. He has been shown as a partner in the Register of Firms. According to the appellants, he is now not shown as a partner in the Register of Firms. This point was not taken up by the defendants in their written statement before the trial court, nor before the appellate Court in the Memorandum of Grounds of appeal nor before this Court in the Memorandum of Grounds of Second Appeal. The question whether a person is shown in the Register of Firms as a partner in the firm is a question of fact. The following observations of their Lordships of the Supreme Court in *Banarsidas v. Kanshi Ram*, (1964)1 S.C.R.316= A.I.R.1963 S.C.1165, (already referred to) also show that such a question cannot be taken for the first time in second appeal. Their Lordships observed:

> "The High Court has overlooked the fact that even upon the argument addressed before it on behalf of Kanshi Ram, the question of limitation was not only purely one of law but was a mixed question of fact and law and, therefore, it was not proper for it to allow it to be raised for the first time in argument. We are satisfied that what the High Court has done has caused prejudice to some of the parties to the suit and on that ground alone, we would be justified in setting side its decision."

In *Chaimanram v. Ganga Saha*, A.I.R.1961 Orissa 94, it was held that the plea that the plaintiff's suit as laid was not maintainable by reason of section 69 of the Partnership Act was a mixed question of fact and law and that such a plea could not be allowed to be raised in second appeal when it was not pleaded in the written statement.

13. In *Mohamad Ali v. Kondho Rayaguru*, A.I.R.1945 Patna 286, the same view was taken. A similar view was taken also in *Kalyan Sahai v. Firm Lachminarain*, A.I.R.1951 Raj.11.

14. The rulings in *Chimanram v. Ganga Saha*, A.I.R.1961 Orissa 94, *Mohamed Ali v. Kondhe Rayaguru*, A.I.R.1945 Patna 286 and *Kalyan Sahai v. Firm Lachminarain*, A.I.R.1951 Rajasthan 11 are cases which deal with the registration of firms. These cases equally apply to the other part of section 69, namely, "whether a person suing is or has been shown as Partner of the Firm". I have already pointed out that the plaintiff has been shown as a partner in the Register of Firms and that it is enough for the purpose of section 69 that in the present suit he has been shown in the Register of firms as a partner of the firm.

15. It should however be noted that the second appeal was admitted only on one substantial question of law which had already been extracted. In the circumstances, I am of the view that the appellants cannot plead for the first time in second appeal that section 69 of the Partnership Act is a bar to the maintainability of the suit by the plaintiff. The courts below were therefore correct in granting a decree as prayed for. There are no reasons to interfere with the findings of the courts below. The second appeal fails and is dismissed with costs.

R.S. ---- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

Present:- *S.Nainar Sundaram, J.*

*W.P.No.2439 of 1984. 18*th July*, 1984.

Chandrika *Petitioner**

v.

Divisional Railway Manager, Southern Railway, Madras-3 and another *Respondents.*

(A) Contract simpliciter - One of the contesting parties being Government - Not circumscribed by statutory obligations or terms - Violation of the terms of the contract cannot be remedied by writ petition.

(B) Natural justice - Principles - Violation of - Applicability to contracts.

The Divisional Railway Manager, Southern Railway, Madras invited tenders in the prescribed form from contractors for the collection of fees on Cycles/Motor Cycles/Scooters parked in the area allotted for cycle stand at Perambur Railway Hospital, Jolarpettai and Perambur and also for the collection of fees on Private Cars parked in the Car stand at Madras Central Railway Station. The period of licence was from 25.10.1983 to 24.10.1985. The petitioner and three others made their tenders and the concerned tender committee recommended that the contract be awarded to the petitioner, she being the highest bidder. By proceeding dated 14.10.1983 the petitioner was awarded the contract. The petitioner charged parking fees in excess of the rate agreed and bundles of tickets issued and non-issued at the higher rates were seized. On 12.1.1984 an order was passed stating in view of the gross violation of the important terms and conditions of the contract, the contract of car park awarded to the petitioner for a term of two years from 25-10-1983 to 24-10-1985 was terminated with effect from 12.3.1984. The present writ petition was filed against that order.

Held:- It is well settled that if there is a violation of the rights under a contract simpliciter, which has neither a source under a statute nor contains nor is circumscribed by statutory obligation it cannot be remedied by writ petition, namely on the ground that one of the contracting parties happens to be the Government or a Government agency or a statutory corporation. In contractual sphere, even if one of the parties to the contract is a Government or a Governmental agency or a statutory corporation, there is no scope for importing the principles of natural justice unless it is found that the very source of the contract is the statute or it contains or is circumscribed by statutory terms or obligations. *[Para.6]*

Cases referred to:-

D.F.O., South Kheri v. Ram Sanehi, (1971)3 S.C.C.864: A.I.R.1973 S.C.205; *K.N.Guruswamy v. State of Mysore*, 1954 S.C.J.644: (1955)1 S.C.R.305: A.I.R.1954 S.C.592; *State of Punjab v. Ajudhia Nath*, (1981)3 S.C.C.251: A.I.R.1981 S.C.1374; *Radhakrishna Agarwal v. The State of Bihar*, (1977)3 S.C.C.457: (1977)3 S.C.R.249: A.I.R.1977 S.C.1496.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the I respondent relating to his order in letter No.M/C.300/Car Park/MAS dated 12.1.1984 and quash the same.

R.Sundaravaradan, for Petitioner.

K.Venkateswara Rao, for Respondents.

The Court made the following

ORDER:- The Divisioanl Railway Manager, Southern Railway, Madras, the first respondent, invited tenders in the prescribed form for contractors for

collection of fees on Cycles/Motor Cycles/Scooters. parked in the area allotted for Cycle Stand at Perambur Railway Hospital, Jolarpettai and Perambur, and also for the collection of fees on Private Cars parked in the Car Stand at Madras Central Railway Station. The period of licence was from 25-10-1983 to 24-10-1985. The petitioner and three others made their tenders and the concerned Tender Committee recommended that the contract be awarded to the petitioner, she being the highest bidder. By the proceedings dated 14-10-1983, the petitioner was awarded the contract. We are more concerned with one term in the contract which runs as follows:-

> "The contract is liable to be summarily terminated in the event of any violation of the conditions of the contract including unsatisfactory service, subletting or any other improper act on your part. The contract is ordinarily terminable on two months notice in writing on either side without assigning any reason."

At the outset, it must be pointed out that it is not the case of the petitioner that the contract was entered into by the first respondent in exercise of any statutory power under any Act or Rules framed thereunder and, admittedly, the contract did not contain any statutory term or obligation.

2. On 3-1-1984, the first respondent passed an order as follows:

> "The above contract was awarded to you for a term of two years from 25-10-83 to 24-10-85 with a specific condition that the parking fees for private cars levied by you should not exceed Rs.1/ per car per day or part thereof. But complaints have been received alleging that you are collecting Rs.1.50 per car per day or part thereof. This is highly irregular. In fact an advocate who parked his car in the car parking area has produced a receipt (Token) given by your representative at the Car Park for Rs.1.50 and complained about excess collection. you are fined Rs.25/- for this excess collection of licence fee. Please note that if you do not stop this excess collection with immediate effect, action will be taken to terminate the contract and recover any loss that may be suffered by the Railway by awarding the contract to other party."

We are not very much concerned with the aforesaid order in the present writ petition. But, it must be pointed out that the petitioner has not expressed any grievance over the imposition of fine by this order. On 12-1-1984, the order impugned in the writ petition has come to be passed by the first respondent, the terms of which run as follows:-

> "The contract of car park at Madras Central was awarded to you for a term of two years from 25-10-1983 to 24-10-1985 for a sum of Rs.4,44,447/- with a specific condition that the parking fees levied on private cars shall not exceed Re.1/- per car per day or part thereof.
>
> On receipt of complaint from a local advocate that you were collecting Rs.1-50 per car per day, the section superintendent, Madras Central had conducted a surprise check on 3-1-84 at the private car Parking area and seized a few bundles of tickets both issued and non-issued. All these tickets were bearing Rs.1-50. This has confirmed that you are collecting Rs.1-50 which is more than the authorised rate of Re.1/-.
>
> Moreover, you have not executed the agreement and produced the current Income-tax Clearance Certificate so far even though you have taken up the contract on 25-10-1983.
>
> In view of the gross violation of the important terms and conditions of the contract, the contract of Car Park awarded to you for a term of two years from 25-10-1983 to 24-10-1985 is terminated with effect from 12-3-1984."

3. In attacking the order of the first respondent dated 12-1-1984, Mr.R.Sundaravaradan, learned counsel for the petitioner, would put forth two grounds. One is that the petitioner was not afforded an opportunity to make her say against the cancellation of the contract before the impugned order came to be passed. Learned counsel is conscious that the matter relates to contract. The ordinary rule is, if the State or its agent or a statutory Corporation enters into the field of ordinary contract, having no source in any statutory power or attracting any statutory power or obligation, the relations are no longer governed by the constitutional provisions, but by the provisions of the contract which determine the rights and obligations of the parties *inter se*. Learned counsel would plead that in the instant case, there is a violation of the principles of natural justice and this Court can definitely intervene and exercise the writ power. In support of this submission, learned counsel first relies on a pronouncement of the Supreme Court in *D.F.O.South Kheri v. Ram Sanehi*, (1971)3 S.C.C.864= A.I.R.1973 S.C.205. From the facts disclosed in that judgment, I find that it was a case of an auction held by the concerned Forest Officer and, obviously, such an auction had come to be held pursuant to statutory powers. In the said context, after referring to the earlier pronouncement in *K.N.Guruswamy v. State of Mysore*, 1954 S.C.J.644= (1955)1 S.C.R.305= A.I.R.1954 S.C.592, it was held that merely because the source of the right which the aggrieved party claims was initially in a contract, he need not resort to a suit for obtaining relief against any arbitrary and unlawful action on the part of a public authority and there could be a resort to a petition by way of writ. The case is clearly distinguishable. It was obviously a case where the contract was entered into pursuant to powers invested therefor by statute. The view expressed in *K.N.Guruswamy v. State of Mysore*, 1954 S.C.J.644= (1955)1 S.C.R.305= A.I.R.1954 S.C.592, is also that a writ petition is maintainable even if the right to relief arose out of an alleged breach of contract, where the action challenged was of a public authority invested with statutory power.

4. Next, learned counsel would rely on the pronouncement of the Supreme Court in *State of Punjab v. Ajudhia Nath*, (1981)3 S.C.C.251= A.I.R.1981 S.C.1374. That again was a case of grant of licence under the Punjab Excise Act and the Rules framed thereunder and it was recognized that although an opportunity of being heard has to be given to a liquor vendor when his licence is sought to be cancelled, the same principle of natural justice does not come into play when the demand is merely for payment of a sum becoming due under the conditions, subject to which the licence was granted. The ratio of this case also cannot be applied to the facts of the present case, because the present case does not concern a contract entered into or awarded under any statutory power, nor the contract contains nor is circumscribed by any statutory term or obligation. It is non-statutory and purely contractual.

5. In *Radhakrishna Agarwal and others v. State of Bihar and others*, (1977)3 S.C.C.457= (1977)3 S.C.R.249= A.I.R.1977 S.C.1496, it was found that the contracts did not contain any statutory terms or obligations and no statutory power or obligation which would attract the application of Article 14 of the Constitution of India was involved, and it was held that the limitations imposed by rules of natural justice cannot operate upon powers which are governed by the terms of an agreement exclusively and the only question which normally arises in such cases is whether the action complained of is or is not in consonance with the terms of the agreement. The Supreme Court approved the following division of the types of cases involving breaches of alleged obligations by the State or its agents, as done by the Patna High Court, from whose decision the matter had come before the Supreme Court:

"(i) Where a petitioner makes a grievance of breach of promise on the part of the State in cases where on an assurance or promise made by the State he has acted to his prejudice and predicament, but the agreement is short of a contract within the meaning of Article 299 of the Constitution.
(ii) Where the contract entered into between the person aggrieved and the State is in exercise of a statutory power under a certain Act or Rules framed thereunder and the petitioner alleges a breach on the part of the State; and
(iii) Where the contract entered into between the State and the person aggrieved is non-statutory and purely contractual and the rights and liabilities of the parties are governed by the terms of the contract, and the petitioner complains about breach of such contract by the State."

The cases before the Supreme Court did not belong to either the first category or the second category. Equally so, the case before me does not belong to either the first or the second category. The cases before the Supreme Court and the case before me belonged to the third category, where the contract entered into was non-statutory and purely contractual and the rights and liabilities of the parties are governed by the terms or the contract alone. The cases relied on by Mr.R.Sundaravaradan relate to the second category and, in fact, the Bench consisting of three leanred Judges of the Supreme Court, in *Radhakrishna Agarwal v. State of Bihar*, (1977)3 S.C.C.457= A.I.R.1977 S.C.1496, distinguished the cases in *D.F.O.South Kheri v. Ram Sanehi*, (1971)3 S.C.C.864= A.I.R.1973 S.C.205 and *K.N. Guruswamy v. State of Mysore*, 1954 S.C.J.644= A.I.R.1954 S.C.592, as belonging to the second category. The principles recognised by the Supreme Court in *Radhakrishna Agarwal v. State of Bihar*, (1977)3 S.C.C.457= A.I.R.1977 S.C.1496, have been well brought out in the relevant extracts in the Head Notes of the report and they can be appropriately imported as hereunder.

"At the very threshold or at the time of entry into the field of consideration of persons with whom the Government could contract at all, the State, no doubt, acts purely in its executive capacity and is bound by the obligations which dealings of the State with the individual citizens import into every transaction entered into in exercise of its constitutional powers. But, after the State or its agents have entered into the field of ordinary contract the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se. No question arises of violation of Article 14 or of any other constitutional provision when the State or its agents, purporting to act within this field, perform any act. In this sphere, they can only claim rights conferred upon them by contract and are bound by the terms of the contract only unless some Statute steps in and confers some special statutory power or obligation on the State in the contractual field which is apart from contract.

Held that (i) the contracts did not contain any statutory terms or obligations and no statutory power or obligation which could attract the application of Article 14 was involved.

(ii) It was the contract and not the executive power regulated by the Constitution, which governed the relations of the parties on the facts apparent in the instant cases. They involved questions of pure alleged breaches of contract. No writ or order could issue under Article 226 in such case to compel the authorities to remedy a breach of contract pure and simple."

"The limitations imposed by rules of natural justice cannot operate upon powers which are governed by the terms of an agreement exclusively. The only question which normally arises in such cases is whether the action complained of is or is not

in consonance with the terms of the agreement."

In the latter case of *State of Punjab v. Ajudhia Nath*, (1981)3 S.C.C.251= A.I.R.1981 S.C.1374, the further line of distinction has been drawn even in respect of cases where the contract has its source in the statutory power or contains or is circumscribed by statutory terms or obligations, and it has been pointed out that reasonable opportunity has to be given for cancellation and not with regard to enforcement or avoidance of terms or obligations under the contract.

6. We can take it as well settled that if there is a violation of the rights under a contract simpliciter, which has neither a source under a statute nor contains nor is circumscribed by statutory terms or obligations, such violation of contractual obligations cannot be remedied by writ petition, merely on the ground that one of the contracting parties happens to be the Government or a Governmental agency or a statutory corporation. In contractual sphere, even if one of the parties to the contract is a Government or a Governmental agency or a statutory corporation, there is no scope for importing the principles of natural justice unless it is found that the very source of the contract is the statute or it contains or is circumscribed by statutory terms or obligations.

7. Further pressing forth the first submission, learned counsel for the petitioner would contend that the action itself is punitive and arbitrary in character and hence, the principles of natural justice will be attracted and this court should intervene in writ powers. This submission, in my view appears to be of no consequence and substance because once it is admitted that the matter relates to contractual terms and obligations simpliciter, it cannot get out of the limitations delineated above and which must be kept in mind with regard to exercise of jurisdiction under Article 226. I had occasion to recapitulate the principles in *E.Dhanapal v. Neyveli Lignite Corporation Limited*, W.P.No.912 of 1982, Order dated 5-2-1982, while dealing with a case belonging to the third category, referred to above. Hence, I have to eschew the first ground of attack put forth by the learned counsel for the petitioner.

8. The second ground of attack urged by the learned counsel for the petitioner is that the notice of termination is not in accordance with the concerned term in the contract. This submission comes within the vice of the first principle recognised and it is not possible to countenance the submission and this contention could not be justiciated in writ jurisdiction. Hence, I have to repel the same. For all these reasons, the writ petition fails and the same is dismissed. I make no order as to costs.

R.S. ----- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

Present:- *S.Ratnavel Pandian, J.*

*W.P.No.11107 of 1983. 18*th December*, 1984.

S.Palaniswami *Petitioner**

v.

The Government of Tamil Nadu represented by its Commissioner and Secretary, Agriculture Department, Madras-9 and another *Respondents.*

(A) Tamil Nadu State and Subordinate Services Part II Rules 10 (a)(i) and 10 (c)(iii) - "Approved Candidate " - Definition of - Temporary appointments can be made only when it becomes necessary.

(B) Words and Phrases - "As soon as possible" - Meaning of.

The petitioner, who as an M.Sc. Post-Graduate in Geology, applied for the post of Geological Assistant in the Agricultural Engineering Branch of the Tamil Nadu Agricultural Subordinate Service. There were 13 vacancies to the said post to be filled up. These 13 posts were earlier filled up by temporary heads under the emergency provisions and the notification issued was for regular appointments. The petitioner appeared for interview and his selection was intimated to him in writing. The list of 13 selected candidates for filling up the 13 vacancies was published and the petitioner was the seventh candidate in that list. The petitioner also sent a physical fitness certificate. Since he did not hear anything further he sent a registered letter requesting the authorties to take up appropriate action to enable him to join the Department. As there was no reply the petitioner addressed a letter to the Chief Minister and the Minister for Agriculture pointing out that there had been a delay of more than 18 months in giving a post. This also had not evoked any response. The petitioner therefore filed a writ petition.

As to the meaning of the words "as soon as possible" occurring in Rule 10 (a)(iii) of the Tamil Nadu State and Subordinate Service Rules and whether a regularly selected approved candidate can be kept without a posting keeping a temporary appointee in the post,

Held:- From Rules 10 (a)(i)(1) of Part II (General Rules) of the Tamil Nadu State and Subordinate Services Rules it is clear that a temporary appointment can be made only, when it became necessary in public interest owing to an emergency and when there is an approved candidate qualified to hold the post under the Rules the temporary candidate should be replaced 'as soon as possible' by the approved candidate. The expression 'approved candidate' is defined under Rule 2(2) of Part I (Preliminary Rules) of the Service Rules. In this case the first respondent does not refute the claim of the petitioner, as an approved candidate but has only stated that the question of ousting the temporary candidates and the posting of the selected candidates was under the active consideration of the Government. Therefore there is no other alternative except to hold that the petitioner is an approved candidate. In this case, the Tamil Nadu State and Subordinate Services Rules, framed in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, required a person appointed under Rule 10 (c)(i) to be replaced as soon as possible, by a member of service or approved candidate qualified to hold the post under the said Rules. It cannot be controverted, that the Government, which is not disputing the claim of the petitioner to be an approved candidate, has not taken any action to give immediate effect to the selection list, but is adopting dilatory tacties or at least taking a lethargic attitude in making the postings to the approved candidates. *[Para.7]*

Rule 10 (a)(iii) of the rules framed under Article 309 of the Constitution states that a temporary candidate, irrespective of the qualification prescribed for the service, shall be replaced as soon as possible by a member of the service or an approved candidate qualified to hold the post under the Rules. Therefore, the conclusion would be that the Government are bound to give postings to the candidates selected by the Service Commission (approved candidates) according to the ranks allotted to them, as contemplated under rule 10 (a)(iii). *[Para.8]*

The Government would not be justified in saying that the expression "as soon as possible" occurring in Rule 10 (a)(iii) does not provide any ultimatum regarding the time and prolong the matter of posting of the petitioner endlessly despite the fact that the selection list was published. *[Para.9]*

Cases referred to:-

Kalyani Dayal v. Union of India, (1980)3 S.C.C.245; *B.N.Nagarajan v. State of Mysore*, (1966)3 S.C.R.682: (1967)2 S.C.C.664: A.I.R.1966 S.C.1942; *State of Kerala v. M.K.Krishnan Nair*, (1978)2 S.C.R.864: (1978)2 S.C.J.531= (1978)1 S.C.C.552= A.I.R.1978 S.C.747; *State of Gujarat v. Raman Lal Kesav Lal*, (1983)1 S.C.R.287= (1983)2 S.C.C. 33= A.I.R.1984 S.C.161= 1983 Lab.I.C. 391; *State of Haryana v. S.C.Marwaha*, (1974)1 S.C.R.165= A.I.R.1973 S.C.2216= (1974)3 S.C.C.220; *Hydraulic Engineering Company Limited v. Mahaffie*, (1878)4 Q.B.D.670 (C.A.).

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of mandamus, directing the respondents to comply with rules 10 (a) (i) and 10 (a)(iii) of the Tamil Nadu State and Subordinate Services Part II General Rules to appoint the petitioner who is an "approved candidate" immediately in a post of Geological Assistant in the Agricultural Subordinate Services or any other equivalent post of the Department.

K.S.Sivasubramanyan, for Petitioner.

J.Kanakaraj, Additional Government Pleader, for Respondents.

The Court made the following

ORDER:- This writ petition is filed by one S.Palaniswami praying for the issuance of a writ of mandamus directing the respondents viz., the Government of Tamil Nadu represented by its Commissioner and Secretary, Agricultural Department, and the Chief Engineer, Agricultural Engineering Department, to comply with Rules 10 (a)(i) and 10 (a)(iii) of the Tamil Nadu State and Subordinate Service Rules, Part II (General Rules) and to appoint the petitioner who is an "approved candidate" immediately in the post of Geological Assistant in the Agricultural Engineering Branch of the Tamil Nadu Agricultural Subordinate Services or in any other equivalent post of the said department.

2. The brief facts which led to the filing of this writ petition are as follows: The petitioner, who is a M.Sc. post-graduate in Geology, applied for the post of Geological Assistant in the Agricultural Engineering Branch of the Tamil Nadu Agricultural Subordinate Service, in response to an advertisement of the Tamil Nadu Public Service Commission (hereinafter referred to as the Commission) dated 27-4-1981, notifying 13 vacancies for the said post, to be filled up. These 13 posts were earlier filled up by temporary hands under the emergency provisions and this notification is for regular appointments. The petitioner appeared for interview in February, 1982, before the Commission and his selection for the post was initmated to him in the second respondent's letter E E 1/24233/82 dated 12-3-1982, and the letter of the Commission 1407-04/81 dated 22-3-1982. The list of the 13 selected candidates for filling up the 13 vacancies was published in the Commission's bulletin No.14 dated 1-7-1982. The petitioner was the seventh candidate in the list. The petitioner has submitted a physical fitness certificate in March, 1982, as instructed

by the commission, as per the memorandum dated 12-3-1982 of the office of the Chief Engineer (Agricultural Engineering), Madras.

3. According to the petitioner; he did not hear anything further and therefore he sent a letter dated 22-12-1982 to the second respondent by registered post requesting the latter to take appropriate action so as to enable him to join the Department, with copies addressed to the Minister for Agriculture, Government of Tamil Nadu, and to the first respondent. As there was no response, the petitioner addressed a letter dated 30-9-1983 to the Chief Minister and the Minister for Agriculture, with copies to the first and the second respondents pointing out that there had been a delay of more than 18 months in giving a post, though he was selected by the Commission in March, 1982. This also had not evoked any response from the respondents. According to the petitioner, he is an approved candidate as defined in Rule 2(2) of Part I - Preliminary of Tamil Nadu State and Subordinate Service Rules, framed under Article 309 of the Constitution of India (hereinafter referred to as the Service Rules). The grievance of the petitioner is that there are ten temporary geologists appointed under Rule 10 (a)(i) in January, 1979, who are to be ousted under rule 10 (a)(iii) of the Rules on the approved candidates selected by the Commission joining the posts, but out of the 13 approved candidates selected by the Commission, only the first four candidates have been appointed in September, 1983, leaving out the other selected candidates inclusive of the petitioner, while at the same time allowing the temporary candidates to continue in the department, which action of respondents 1 and 2 is in flagrant violation of the Service Rules. Hence this writ petition for the above relief.

4. The respondents in their counter affidavit would state that 13 Geological Assistants temporarily working in the second respondent's department from 1979 onwards had also applied for selection and of those persons two candidates have been selected by the Commission. Some temporary Geological Assistants working in the department have represented to the Government that they have not been called for interview and requested that a special selection might exclusively be conducted for them so that they might be absorbed in the agricultural Department on regular basis. The Government requested the Commission, in their letter No.1296/IA III/82-1, Agriculture, dated 17-7-1982, to interview the remaining 11 temporary agricultural Assistants and consider their suitability along with the other candidates already interviewed, and also intimated that they were willing to relax the Rules in their favour in case they were selected by the Commission. According to the Ad Hoc Rules governing the post of Geological Assistant, the minimum educational qualification prescribed in only B.Sc., Geology, whereas all the candidates selected by the Commission possess M.Sc., in Geology. The question of ousting the temporary hands was under the continuous consideration of the Government. While so, two new posts were sanctioned apart from the 13 posts under consideration. From the approved list of 13 candidates, Sl.Nos.1 and 3 were appointed to the new posts following the order of seniority, and Sl.No.2, who was already working in the Department under Rule 10 (a)(i) and who was selected by the Commission, has been regularized in the appointment. Sl.No.4 was appointed against the vacancy caused due to the resignation of one temporary Geological Assistant, who also was selected by the Commission and placed as S.No.8. According to the respondents, as the temporary candidates have gained much experience due to their long service, the Government are considering ways and means to avoid ouster and this has caused delay in absorbing the remaining candidates.

5. Mr.K.S.Sivasubramaniam learned counsel appearing on behalf of the Petitioner, drew the attention of this Court to Rule 10 (a)(i) and (iii) of part II (General Rules) of the Services Rules, and submitted that temporary appointments can be made only in circumstances causing undue delay in making

regular appointments in accordance with the Rules and that a person appointed on temporary basis, whether or not he possesses the qualifications prescribed for the service for which he is temporarily appointed, should be replaced as soon as possible by a member of the service or an approved candidate qualified to hold the post. According to him, applying the above principle, the petitioner, who is an approved candidate qualified to hold the post under the Rules, ought to have been appointed replacing the temporarily appointed persons. He would further state that the petitioner, who has been selected as one of the 13 candidates for the 13 vacancies and ranked as No.7 among them, as per the list published in the Commission's Bulletin No.14 dated 1-7-1982, is an approved candidate as defined in Rule 2 (2) of Part I (Preliminary Rules) of the Service Rules framed under Article 309 of the Constitution of India and as such he ought to have been appointed in 1982 itself and there is no justification on the part of the respondents for delaying in making the petitioner's appointment.

6. Countering the above argument, Mr.Kanakaraj, learned Additional Government Pleader (writs) would submit that there is no legal duty imposed on the Government to make an appointment merely because there are vacancies of permanent posts and because the Service Commission has selected and prepared a list of candidates eligible for consideration for appointment and that there is no legal right vested in the selected candidates inclusive of the petitioner to compel the Government to make the appointments and therefore no mandamus can be issued as prayed for.

7. Now let me examine the respective contentions of the parties. Rule 10 (a)(i)(1) of Part II (General Rules) of the Tamil Nadu State and Subordinate Services Rules reads as follows:

"Where it is necessary in the public interest owing to an emergency which has arisen to fill immediately a vacancy in a post borne on the cadre of a service, class or category and there would be undue delay in making such appointment in accordance with these rules and the special rules, the appointing authority may temporarily appoint a person, otherwise than in accordance with the said rules."

The other rule relevant for the disposal of this writ petition is rule 10 (a)(iii), which reads thus:

"A person appointed under clause (i) shall, whether or not he possesses the qualifications prescribed for the service, class or category to which he is appointed, be replaced as soon as possible by a member of the service or an approved candidate qualified to hold the post under the said Rules."

From the above rules, it is clear that a temporary appointment can be made only when it becomes necessary in public interest owing to an emergency and that when there is an approved candidate qualified to hold the post under the Rules the temporary candidate should be replaced as soon as possible by such approved candidate. The expression 'approved candidate' is defined under rule 2(2) of Part I (Preliminary Rules) of the Services Rules, which is as follows:

" "Approved candidate" means a candidate whose name appears in an authoritative list of candidates approved for appointment to any service, class or category."

In paragraph 2 of the affidavit, the petitioner has averred:

"I am the seventh candidate as published in the list. I am thus 'approved candidate' as defined in Rule 2(2) of Part I Preliminary of Tamil Nadu State and Subordinate Services Rules issued by the Governor of Tamil Nadu under Article 309 of the Constitution of India. . ."

While answering this, in paragraph 7 of the counter, the first respondent

does not refute the claim of the petitioner as an approved candidate, but has only stated that the question of ousting the temporary candidates and the posting of the selected candidates is under the active consideration of the Government. Therefore, there is no other alternative except to hold that the petitioner is an approved candidate. In this connection, learned counsel would draw the attention of this Court to the decision of the Supreme Court in *Kalyani Dayal v. Union of India*. (1980)3 S.C.C.245 wherein, having regard to the facts of that case, the following observations have been made:

> "The inevitable sequitur from these constitutional provisions is that the President, acting directly or through officers subordinate to him, is free to constitute a service (with as many cadres as he chooses), to create posts without constituting a service or to create posts outside (the cadres of) the constituted services. The President (or the person directed by him) may, or again, if he so chooses he may not, make rules regulating the recruitment and conditions of service of persons appointed to such service or posts. He is also free to make or not to make rules of recruitment etc., before a service may be constituted or a post created or filled. But if there is an Act of Parliament or a rule under the proviso to Article 309 on the matter, the executing power, under Articles 53 and 73, may not be exercised in a manner inconsistent with or contrary to such Act or rule. (Vide *B.N.Nagarajan v. State of Mysore*, (1967)2 S.C.J.664= (1966)3 S.C.R.682= A.I.R.1966 S.C.1942. *State of Kerala v. M.K.Krishnan Nair*, (1978)1 S.C.C.552= (1978)2 S.C.C.531= (1978)2 S.C.R.864= A.I.R. 1978 S.C.747."

Reliance was also placed by the petitioner on yet another decision, viz., *State of Gujarat v. Raman Lal Kesav Lal*, (1983)1 S.C.R.287= (1983)2 S.C.C. 33= (1983) Lab. I.C.391= A.I.R.1984 S.C.161, wherein the Supreme Court held that the High Court of Gujarat was justified in directing the State Government to discharge a statutory duty to make orders for the equation of posts and to extend the benefits arising out of the reports of the two Pay Commissions in question, which benefits had been denied to the local cadre only. This decision is relied upon for the purpose of showing that this court would be justified in directing the State Government in the present case to discharge its statutory duty of giving postings to the approved candidates empanelled in the list published by the Public Service Commission in the place of temporary employees. In this case, the Tamil Nadu State and Subordinate Services, Rules, framed in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, required a person appointed under Rule 10 (a)(i) to be replaced, as soon as possible, by a member of service or approved candidate qualified to hold the post under the said Rules. It cannot be controverted that the Government, which is not disputing the claim of the petitioner to be an approved candidate, has not taken any action to give immediate effect to the selection list, but is adopting dilatory tactics or at least taking a lethargic attitude in making the postings to the approved candidates.

8. The learned Additional Government Pleader, placing reliance on the decision of the Supreme Court in *State of Haryana v. S.C. Marwaha*, (1974)3 S.C.C.220= A.I.R.1973 S.C.2216= (1974)1 S.C.R.165 submits that a writ of mandamus will not issue as there is no statutory obligation or duty on the part of the Government to make appointments of the candidates selected by the Commission and as the selected candidates have no vested right and the mere selection would not vest any right in the petitioner and other candidates selected. But, the fact remains that the respondents, in their counters, have not taken such a stand, but would approach the matter in an entirely different manner, repeatedly, pointing out that the government are

considering ways and means to avoid ouster of temporary candidates who have gained much experience in the Agricultural Engineering Department on account of their long services and the delay in posting the selected candidates has occasioned as the government has to take a decision on the question of either outing or retaining the temporary employees and that the expression 'as soon as possible' occurring in Rule 10 (a)(iii) does not contemplate any ultimation regarding time. This statement of the respondents in their counter implies that the government intend to appoint the petitioner and other selected candidates after a final decision is taken on the question of ousting or retaining the temporary employees.. Therefore, the presnet argument advanced by the learned Additional Government Pleader does not assume any significance or merit acceptance in view of the specific stand taken in the counter. Above all, rule 10 (a)(iii) of the Rules framed under Article 309 of the Constitution states that a temporary candidate, irrespective of the qualification prescribed for the service, shall be replaced as soon as possible by a member of the service or an approved candidate qualified to hold the post under the Rules. Therefore, the conclusion would be that the Government are bound to give postings to the candidates selected by the Service Commission (approved candidates) according to the ranks allotted to them, as contemplated under Rule 10 (a)(iii). In fact, when this writ petition came up for hearing, adjournments more than one were given for the Government to take a decision on the question of ousting or retaining the temporary employees and giving posting to the petitioner. But, no positive reply has been given by the respondents, except saying that they are considering the matter.

9. The Government would not be justified in saying that the expression "as soon as possible" occurring in Rule 10 (a)(iii) 'does not provide any ultimation regarding the time' and prolong the making of the posting of the petitioner endlessly despite the fact that the selection list published in the Commission's Bulletin No.14 dated 1-7-1982 and that Sl.Nos.1 to 4 of the selected candidates have been pointed. The meaning of the expression 'as soon as possible is given in words and phrases legally defined by John B.Saunders, Second (1969) Edition, Volume 1, at page 121, as follows:

> To do a thing 'as soon as possible' means to do it within a reasonable time, with an undertaking to do it in the shortest practical time . . . ". *Hydraulic Engineering Company Ltd. v. Mchaffie*, (1878)4 Q.B.D.670 (C.A.) per Bramwell, L.J. at p.673."

In the present case, 2½ years have elapsed since the publication of the list. There can be no justification for the respondents to further delay the appointment, purporting to take shelter under the expression 'as soon as possible'. In my view, what the respondents are doing is to make the appointments of the selected candidates as late as possible, instead of 'as soon as possible."

10. For all the resons stated above, there will be an order directing the respondents to give posting to the petitioner within three months from this date. The writ petition is accordingly allowed. There will, however, be no order as to costs.

R.S. ---- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *S.Nainar Sundaram, J,*

*C.R.P.No.3295 of 1984. 18*th September,* 1984.

Ponnuswamy Pandaram *Petitioner**

v.

Salem Vaiyappamalai Jangamar Sangam rep. by its President Palanivel, having its Office at Vaiyappamalai, Tiruchengode Taluk *Respondent.*

(A) Civil Procedure Code (V of 1908), section 115 - Appointment of a Commissioner for local inspection - Application dismissed - Revision against that order - Whether maintainable.

(B) Civil Procedure Code (V of 1908), Order 26, rule 9 - Scope and applicability.

(C) Words and Phrases - "Case decided" - What is.

Regarding a controversy as to whether constructions being put up by a defendant are within his own lands or whether they have encroached into the lands of the plaintiff, a local investigation is the best way to find out the position and a party, coveting to place the evidence before the Court through local investigation by a Commissioner cannot be shut out of that right. A misconception has weighed in the mind of the Court below when it reasoned that there is no dispute about the ownership of the survey number by the third defendant. That is not the point in issue. Shutting out the evidence which a party is entitled to place before Court to substantiate his case, definitely decides the right of the party, adversely against him and in this view, the order passed by the Court below is a "case decided" and apart from that, on merits the order passed by the Court below comes within the mischief of the ratio adumbrated in section 115 of the Civil Procedure Code. There has been a failure to exercise jurisdiction vested in it by the Court below on a patent misconception of the position and this obliges an interference in revision. *[Para.8]*

Cases referred to:-

R.S.Khanna v. F.J. Dillon, (1964)4 S.C.R.409= A.I.R.1964 S.C.497; *Ballavpat v. Filmstan Distributors*, (1970)1 S.C.J. 342= (1970)1 S.C.R.435= A.I.R.1970 S.C.406; *Ramgulam v. Rawin*, A.I.R.1972 Pat.499; *Manvinier Kaur v. Godha Ram*, A.I.R.1979 P. & H.76.

R.Goudamanarayanan, for Petitioner.

K.Sarvabhauman, for Respondent.

The Court made the following

ORDER:- The third defendant in O.S.No. 474 of 1983 on the file of the District Munsif of Tiruchengode, is the petitioner in this revision. The respondent is the plaintiff. The plaintiff has filed the suit for a permanent injunction restraining the defendants and their men from in any manner interfering with the plaintiff's peaceful possession and enjoyment of the suit properties by way of digging foundations, etc. The suit properties are in particular survey numbers viz., S.Nos.289/2 to 289/19 in the concerned village. According to the plaintiff, the defendants are trying to put up foundations in the western portion of S.Nos.289/2 and 289/1. The third defendant had filed a written statement and according to him, S.No.289/1 belongs to him and the foundations put up by him are only within the portion of S.No.289/1. Hence, the moot question that apparently comes up for adjudication on the pleadings is as to whether the foundations put up by the 3rd defendant are within S.No.289/1 or whether they have encroached upon the lands of the plaintiff. The 3rd defendant took out I.A.No.571 of 1984 under Order 26, rule 9 read with section 151 of the C.P.C. hereinafter referred to as the Code, to

appoint a Commissioner to inspect the suit properties and S.No.289/1, to note down as to whether the third defendant's constructions are well within S.No.289/1 and other physical features that may be pointed out at the time of inspection and to submit a report with a plan drawn to scale. The court below has dismissed this application, stating that there is no dispute with reference to the ownership of S.No.289/1 and hence, there is no need for appointment of a Commissioner and the parties can prove their case by evidence and documents. This order of the Court below is the subject-matter of challenge in this revision.

2. Mr. K.Sarvabhauman, learned counsel for the respondent, took a preliminary objection that the order of the Court below will not fall within the category of 'a case decided' as per section 115 of the Code, and hence it is not permissible for this Court to exercise revisional powers. This preliminary objection has got to be adverted to and decided before this Court would proceed to adjudicate the other aspects involved in the revision. It is no longer possible to claim that a case decided could relate only to the main suit and not any other proceedings between the initiation of the suit and its final adjudication. In *R.S.Khanna v. F.J.Dillon*, (1964)4 S.C.R.409= A.I.R.1964 S.C.497 three learned Judges of the Supreme Court countenanced as follows while dealing with an interlocutory order by which the suit was held to be not maintainable:

> "The expression "case" is a word of comprehensive import; it includes civil proceedings other than suits, and is not restricted by anything contained in the section to the entirety of the proceeding in a civil court. To interpret the expression 'case' as an entire proceeding only and not a part of a proceeding would be to impose a restriction upon the exercise of powers of superintendence to which the jurisdiction to issue writs, and the supervisory jurisdiction are not, subject and may result in certain cases in denying relief to an aggrieved litigant where it is most needed, and may result in the perpetration of gross injustice. The expression 'case' includes a suit, but in ascertaining the limits of the jurisdiction of the High Court, there would be no warrant for equating it with a suit alone."

From the inception of the suit until it is disposed of one way or the other, innumberable proceedings crop up and innumerable rights and obligations are claimed by and cast upon the parties and they have to be decided in such proceedings and if, in fact, some right or obligation of the parties in controversy gets decided in the course of such proceedings, that would amount to 'a case decided."

3. In *Ballavpat v, Filmstan Distributors*, (1970)1 S.C.J.342= (1970)1 S.C.R.435= A.I.R.1970 S.C.406 the learned Judges of the Supreme Court dealt with an order of the trial court disallowing objections to certain questions in cross-examination, and the learned Judges held that it would not be a case decided and that the High Court was in error in exercising the powers of revision. After adverting to the ratio with regard to the expression 'case' enunciated in *S.G.Khanna v. F.J.Dillon*, A.I.R.1964 S.C.497= (1964)4 S.C.R.409 it has been observed as follows:-

> "A case may be said to be decided if the Court adjudicates for the purposes of the suit some right or obligation of the parties in controversy; every order in the suit cannot be regarded as a case decided within the meaning of section 115 of the C.P.C."

This decision of the Supreme Court by itself does not delineate extensively as to the adjudication of what type of rights or obligations, of the parties would amount to a case decided. The learned Judges dealt with, as stated above a case where the trial court disallowed objections to certain questions in cross examination, and it was held that it is not a case decided.

4. In *Ramgulam v. Rawin*, A.I.R.1972 Pat.499 Untwalia, J. as he then was, dealt with an order allowing the plaintiff to adduce further evidence after the defendant closed his case and the learned Judge opined that it was not a case decided. The following observations of the learned Judge are relevant as they do indicate that from the date of institution of the suit until it is ultimately decided one way or the other, the possibility of orders getting passed in proceedings in between is always there:

> "... It is well known that from the date of institution of a suit or a proceeding and until its conclusion by the trial Court, several orders are made from time to time. Some of them may be erroneous orders and even may smack of errors of jurisdiction. But all interlocutory orders, as the Supreme Court has pointed out, cannot be taken to be a case decided within the meaning of section 115 of the Code. A line has to be drawn between the two types of orders, although both of them are made during the pendency of the suit or proceeding. It has to be noticed whether a particular order is an adjudication by the trial court deciding for the purpose of a suit or proceeding some right or obligation of the parties in controversy, or whether it is an order which is not of that kind."

But the decisive factor to find out the revisability or otherwise of such orders is to determine whether by such orders some right or obligation of the parties in controversy gets decided. The right or obligation need not necessarily have a nexus to the main lis and in the progression of the suit towards its final adjudication and the final resolution of the controversy between the parties. Very many rights and obligation do crop up and they have foundations both in substantive law as well as in procedural law and, if they get decided by such interlocutory orders, they are certainly revisable. Untwalia, J. as he then was, in the case cited above, by way of obiter, delineated a few examples of orders which could be revisable in revisional jurisdiction of the High Court as 'cases decided' in the following terms:-

> "... I may endeavour to give a few examples to make myself clear, as to on which side of the line a particular order would lie. I would like to point out that an order in relation to interim injunction or appointing a receiver, when the case comes to this Court after the matter has been decided by the lower appellate court, or an order of staying the hearing of a suit or proceeding, or an order made under section 11-A of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, and possibly an order in relation to amendment of pleadings, could be the types of orders in which it can be said that the order decides the case as it determines some right or obligation of the parties in controversy, and if there is any error of jurisdiction in that order, the High Court may interfere with it."

The learned Judge also referred to some cases where the orders passed would not be revisable in the following terms:

> "As for example, some question in examination or cross-examination is disallowed, while it ought to have been allowed, some document wrongly admitted in evidence, while it ought not to have been admitted, a pleader commissioner's report is confirmed or set aside and further investigation ordered; these will be the types of interlocutory orders which to my mind cannot be interfered with by the High Court within the meaning of section 115 of the Code.

Of course, they are not exhaustive and they only form examples.

5. The object of local investigation under Order 26, rule 9 of the Code cannot be belittled. Its object is to collect evidence at the instance of the party who relies on the same and which evidence cannot be taken in court

but could be taken only from its peculiar nature, on the spot. This evidence will elucidate a point which may otherwise be left in doubt or ambiguity on record. The Commissioner, in effect is a projection of the Court, appointed for a particular purpose. In this regard, the implication of Order 26, rule 10 cannot be lost sight of when it says that the report of the Commissioner and the evidence taken by him shall be evidence in the suit and shall form part of the record. We are not very much concerned with the (sic) probative value of the report of the Commissioner. But the party has got a right to place evidence which he could require to substantiate his case before the court and, of course, subject to the law of evidence and of the Code, and it is the duty of the Court to receive such evidence unless there are other justifiable factors in law to decline to receive such evidence. The law of evidence enjoins upon the party to prove the fact which he relies on and in that sense, an obligation is cast upon the party and if he fails to discharge that obligation, adverse consequences will follow and he will have to face the repercussions of the same. This right of the party to adduce evidence gets adjudicated in the interlocutory proceedings under Order 26, rule 9. When there is a decline by the Court to issue the commission asked for to make local investigation, the purpose behind it being significant and in stated cases, imperative too, that order certainly disposes of the right claimed by the party to place the requisite evidence on his behalf. The question as to whether a particular order adjudicates some rights or obligations of the parties in controversy will depend upon the nature of the right or obligation and it is not possible to lay down a uniform rule and no decision, including any of the highest Court in the land, attempted to do so. Untwalia, J. as he then was, in case cited above enumerated examples on either side.

6. Mr. K.Sarvabhauman, learned counsel for the respondent, relies on a pronouncement of a bench of the High Court of Punjab and Haryana in *Manvinier Kaur v. Godha Ram*, A.I.R.1979 P and H.76 where the Bench held that an order refusing to appoint a local Commissioner under Order 26, rule 9 of the Code is not a case decided and hence, not revisable. A restricted interpertation has been adopted by the Bench with regard to 'some right or obligation of the parties in controversy'. The learned Judges took the view that such an order did not decide any issue or some right or obligation of the parties in controversy. The learned Judges have not adverted to the place of Order 26, rules 9 and 10 of the Code, and the right of the parties to adduce evidence in substantiation of their case and the implication of the denial of such right. I am not able to adhere to the ratio of the Bench of the High Court of Punjab and Haryana, in view of the reasons already expressed by me.

7. The above discussion eschews the preliminary objection taken by the learned counsel for the respondent.

8. Coming to the question as to whether, on the basis that the order passed by the Court below is a case decided, there is a warrant for interference within the meaning of section 115 of the Code, I find that it is so. A controversy, as we would see from the pleadings, has arisen as to whether the constructions put up by the third defendant are within his land or whether they have encroached into the lands of the plaintiff. A local investigation is the best way to find out the position and the party, namely, the third defendant coveting to place the evidence before the court through local investigation by the Commissioner cannot be shut out of that right. A misconception has weighed in the mind of the Court below when it reasoned that there is no dispute about the ownership of S.No.289/1 by the third defendant. That is not the point in issue. Shutting out the evidence which a party in entitled to place before Court to substantiate his case, definitely decides that right of the party, adversely against him and in this view, the

order passed by the court below is a 'case decided' and apart from that, on merits the order passed by the Court below comes within the mischief of the ratio adumbrated in Section 115 of the Code. There has been a failure to exercise jurisdiction vested in it by the court below to a patent misconception of the position and this obliges me to interfere in revision.

9. For the reasons stated above, this revision is allowed. No costs. The Court below will appoint the Commissioner within a period of two weeks from the date of receipt of a copy of this order, call upon the Commissioner to make a local inspection and submit his report within a period of two weeks thereafter and proceed on with the matter without any further delay.

R.S. ---- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

Present:- *M.N.Chandurkar C.J., and T.Sathiadev, J.*

*W.P.Nos.7286 and 3347 of 1982 and 255 of 1984. *28th November, 1984.*

Mr.K.Anthony Savarimuthu *Petitioner**

v.

The Director of School Education, Madras-6 and another *Respondents.*

Lily Rose Anthony *Petitioner*

v.

State of Tamil Nadu represented by Commissioner and Secretary to Government Education Department, Fort St., George, Madras-9 and others *Respondents.*

and

Panimayam *Petitioner**

v.

The Director of School Education, Madras and others *Respondents.*

Tamil Nadu Recognised Private Schools (Regulation) Act, 1973 (XXIX of 1974), sections 19 and 50; Rule 15 of the Rules framed and Annexure V - Teachers holding certificates issued by Karnataka Secondary Education Examination Board - Whether entitled to be appointed as teachers in the schools in the State of Tamil Nadu - Impact of G.O.Ms.No. 1667, Education dated 5.8.1981 - Karnataka Certificate whether not equivalent to the Certificate issued by the State of Tamil Nadu - Subsequent G.O.Ms.No. 1236 dated 17.9.1984 - Effect and constitutional validity.

The question for consideration in the writ petitions was whether teachers who hold teachers certificates issued by the Karnataka Secondary Education Examination Board can claim that they were eligible to be appointed as teachers in the schools in the State of Tamil Nadu in view of G.Os.Ms.No.1667 dated 5.8.1981 and 1236 dated 17.9.1984. Before 1973, almost for over a period of 20 years, teachers who had obtained certificates from the Karnataka Secondary Education Examination Board were given appointments in the schools of Tamil Nadu, and for all interests and purposes the Karnataka certificate was equated with the T.S.L.C. issue of Government of Tamil Nadu. This state of affairs continued till 5.8.1981. Till that date teachers who were appointed in private schools had to get their certificates approved by the Director of School Education. These certificates were approved almost as a matter of course, because they were treated as equivalent to T.S.L.C. of Secondary Grade, thereby satisfying the requirements of Annexure V of the Rules. Consequent upon recognition of these teachers, by a process of what the department called 'evaluation', schools were also entitled to get Government grants for paying their salary. On 5.8.1981 the Government in the Education Department issued an order in G.O.Ms.No.1667, dated 5.8.1981. This order referred to a communication from the Director of School Education dated 27th March 1981 in which the Director indicated that the Karnataka Certificate is not equivalent to the certificate issued by the State of Tamil Nadu. Consequent upon this G.O., large number of teachers who had already obtained the Karnataka certificates and had also been given appointments in private schools, found that their certificates were not being evaluated and they therefore filed writ petitions for mandamus requiring the authorities to approve with evaluation the appointment of petitioners as Secondary Grade Teachers from the date of their appointment.

That apart G.O.Ms.No.1226 dated 17.9.84 was also issued subsequently laying down fresh criteria for determining the question of equivalence. The G.O. was impugned as unconstitutional.

Held:- It cannot seriously be doubted that the Director of School Education had indicated to the Government that the Karnataka Certificate is not equivalent to the Tamil Nadu Certificate. But when the G.O. made reference to the instructions which were sought by the Director, it appears that the instructions were sought not with a view to stop the evaluation of the Karnataka Certificates permanently, but the evaluation was requested to be stopped for a certain period of time, and the G.O. itself put, this period of time as "until the number of unemployed secondary grade teachers trained in Tamil Nadu is wiped out." This indicates that even according to the Director, if the teachers in Tamil Nadu could be absorbed, then even he did not see any difficulty in appointing teachers holding Karnataka Certificates. The second paragraph of the G.O. shows what the Government permitted the Director to do was to defer the evaluation of the Teachers Training Certificate of Karnataka State with immediate effect. This clearly indicated there was no bar on the evaluation of the Karnataka Certificates, but the evaluation was being merely postphoned. As if to make the matter mere clear, in the last sentence in the G.O. what the Director was asked to do was to issue necessary instructions to defer appointment of Karnataka State Teachers certificate-holders as Secondary Grade Teachers ... till the candidates possessing Secondary Grade or Senior Basic Grade Training School Teachers certificates issued by the Director of Government Examinations, Madras are appointed.

The direction to defer the evaluation was, therefore, to be operative only as long as teachers holding the Tamil Nadu certificates were not absorbed. How then can the operative part of the G.O. dated 5.8.1981 be construed as even remotely suggesting that the Government had accepted the suggestion of the Director that the Karnataka

Certificate should not be treated as being equivalent to the Tamil Nadu Certificates? As a matter of fact, indication is to the contrary, because if the Karnataka Certificate-holders could be appointed after the un-employed teachers holding Tamil Nadu Certificates were all provided for, this could not have been done unless the Karnataka Certificate was treated as being equivalent to the Tamil Nadu Certificate for the purposes of Annexure V. It cannot be said that the G.O. dated 5.8.1981 contained the decision of the State Government that the Karnataka Certificate cannot be equivalent to the Tamil Nadu Certificate. *[Para.15]*

As regards the G.O.No.1226, dated 17.9.1984 is concerned it was clearly open to the State Government to lay down fresh criteria for determining the question of equivalence. Every one of the four criteria laid down has clear nexus with the equivalence of the certificates issued by the Tamil Nadu Institutes. *[Paras.28,29,30]*

The G.O. however cannot be given retrospective effect and cannot affect the rights of teachers who had already obtained certificates and applied for their evaluation. *[Para.27]*

Cases referred to:-

Miss. Satya Rao v. University of Madras, (1977)2 M.L.J.403; *Meenakshi Sundaram v. Director of Legal Studies*, (1981)2 M.L.J.141; *Punjab University v. Devjani Chakrabarti*, (1984)3 S.C.C.612= A.I.R. 1984 S.C.1444; *Kruse v. Johnson*, (1898)2 Q.B.91; *Associated Provincial Picture House Ltd. v. Wednesbury Corporation*, (1948)1 K.B.223; *State of Haryana v. Shamsherjang*, (1973)1 S.C.R.249= A.I.R. 1972 S.C.1546; *A.L.Kaira v. The Project and Equipment Corporation of India Ltd.*, A.I.R.1984 S.C.1361= (1984) Lab.I.C.961= (1984)3 S.C.C.316; *E.P.Royappa v. State of Tamil Nadu*, (1974) Lab.I.C.427= (1974)4 S.C.C.3= A.I.R.1974 S.C.555; *M/s. Kasturi Lal Lakshmi Reddy v. The State of J. & K.*, (1980)4 S.C.C.1= A.I. R.1980 S.C.1992; *Ramana Dayaram Chetty v. The Industrial Air Port Authority of India*, A.I.R.1979 S.C.1628= (1979)3 S.C.C.489= (1979)2 Lab.L.J.217.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a wirt of *Certiorarified mandamus* calling for the records in proceedings No.270012/B3/79 dated 14-8-81 of the Director of School Education, Madras, and quash the same in so far as the petitioner is concerned and directing the Director of School Education Madras the first respondent herein and District Educational Officer, Tirunelveli East, Tuticorin, the second respondent herein to approve with evaluation of the appointment of the petitioner as a Secondary Grade Teacher in Ro.Middle Schools, Siluvaipatti, Tuticorin, Tirunelveli District with effect from the date of appointment from 1-8-81 with all the benefits due to the post, etc.

T.Martin, Anna Mathew and Balasubramanian, for Petitioners.

N.R.Chandran, Additional Government Pleader, for Respondents.

The Order of the Court was made by

Chandurkar, C.J.:- These petitions as well as several other petitions which have all been filed by teachers who hold teachers certificates issued by the Karnataka Secondary Education Examination Board, raise a question which is of considerable importance to a large body of teachers, who claim that they are entitled to be appointed as teachers in the schools in the State of Tamil Nadu.

2. The Tamil Nadu Recognised Private Schools (Regulation) Act, 1973 (hereinafter referred to as the 1973 Act), came into force on 1-12-1974. The Act was enacted for the purpose of regulation of recognised private schools in the State of Tamil Nadu. Prior to this enactment, the affairs of the educational institutions in Tamil Nadu were controlled by the Government of Tamil

Nadu in accordance with what were called Educational Rules made from time to time. The Educational Rules prescribed qualifications for different kinds of teachers.

3. After the 1973 Act came into force, the appointment of teachers and their qualifications were mainly governed by the provisions of section 19 of the Act and the Rules made thereunder. Section 19 of the Act enabled the Government to make rules regulating the number, qualifications and conditions of service (including promotion, pay, allowances, leave, pension, provident fund, insurance, age of retirement and disciplinary matters etc.,) of the teachers and other persons employed in any private school. The rule-making power of the Government is contained in section 50. In exercise of this rule-making power, the Government of Tamil Nadu made the Tamil Nadu Recognised Private School (Regulation) Rules, 1974 (hereinafter referred to as the rules). These rules were amended from time to time. Rule 15 of the Rules dealt with qualifications and conditions of service of teachers and other persons. By the amendment made in 1975, Rule 15(6) provided that, "teachers and other persons employed in a private school shall possess the qualifications specified in Annexure V."

4. We are concerned with item 3 of Annexure V., which deals with qualifications for appointment as a secondary grade teacher. Item 3 reads as follows:
Secondary Grade Teacher.
(1) S.S.L.C..
(2) T.S.L.C. of Secondary Grade or its equivalent Provided teachers who have passed the Nursery, Montessori and Kindergarden School Leaving Certificate examination of Secondary Grade shall be employed to handle standards I and II only."

5. In view of section 19 read with Rule 15 and Annexure V, the qualification for being appointed as a secondary grade teacher was that he should possess a Secondary School Leaving Certificate and, in addition he must also possess a Training School Leaving Certificate for Secondary Grade or its equivalent. Now, so far as the State of Tamil Nadu was concerned, the Training School Leaving Certificate was given after undergoing a course of two years at the Teachers Training Institutes, whether run by the State Government or by private recognised institute. The Training School Leaving Certificate is now known as Diploma in Teachers Education.

6. It is not disputed that before 1973 Act came into force, almost for over a period of 20 years, teachers who had obtained a certificate from the Karnataka Secondary Education Examination Board - we shall refer to this certificate as the Karnataka certificate - were given appointments in Schools in Tamil Nadu, and for all intents and purposes the Karnataka certificate was equated with the T.S.L.C. issued by Government of Tamil Nadu. This state of affairs continued till 5-8-1981. Till that date, the teachers who were appointed in private schools had to get their certificates approved by the Director of School Education. These certificates were approved almost as a matter of course, because they were treated as equivalent of T.S.L.C. of Secondary Grade, thereby satisfying the requirement of Annexure V. Consequent upon recognition of these teachers by a process of what the department called 'evaluation', schools were also entitled to get Government grants for paying their salary.

7. On 5-8-1981, the Government in the Education Department issued an order in G.O.Ms.No.1667, dated 5-8-1981. This order refers to a communication from the Director of School Education dated 27th March, 1981, in which the Director indicated that the Karnataka certificate is not equivalent to the certificate issued by the State of Tamil Nadu. The Director, therefore, sought orders of the Government for issuing suitable instructions "to stop the appointment of teachers trained in Karnataka State in schools situated in Tamil Nadu until the number of unemployed Secondary Grade Teachers trained in Tamil Nadu is wiped out." The Director also requested the

Government "to permit him to stop the evaluation of these certificates with immediate effect." The G.O. recites that the Government "accept the suggestions of the Director of School Education, Madras and permit him to defer the evaluation of the Teachers Training Certificate of Karnataka State with immediate effect." A further direction which was permitted to be given by the Director was in the following terms:

> "The Director of School Education is also permitted to issue necessary instructions to defer appointment of Karnataka State Teachers Certificate holders as Secondary Grade Teachers in Middle or Higher Elementary Schools till the candidates possessing Secondary Grade or Senior Basic Grade Training School Teachers Certificates issued by the Director of Government Examinations, Madras are appointed."

Consequent upon this G.O. a large number of teachers who had already obtained the Karnataka certificates and had also been given appointments in private schools, found that their certificates were not being evaluated and they therefore filed a large number of petitions in this Court for Mandamus, requiring the authorities to approve with evaluation the appointment of the petitioners as Secondary Grade Teachers from the date of their appointment. The petitioner in W.P.No.7286 of 1982 had obtained the Karnataka Certificate on 8-7-1981 and had joined as a temporary secondary grade teacher in R.C.Middle School, Siluvaipatti, Tuticorin taluk, in Tirunelveli District. Since the order of 1981 came in the way of his Karnataka certificate being evaluated, he prayed for the *Mandamus*, as indicated above.

8. The petitioners who came to this Court complaining against the refusal of the Director of Education to evaluate Karnataka certificates and treat them as being equivialent to the T.S.L.C. as contemplated by Annexure V of the rules, fell in three categories as follows:-

(i) Teachers who obtained Karnataka Certificates before 5-8-1981 which were evaluated before 5-8-1981;

(ii) Teachers who obtained their Karnataka Certificates before 5-8-1981, but the certificates were not evaluated; and

(iii) Teachers who obtained their certificates after 5-8-1981 and whose certificates were not evaluated.

9. The occasion for the first category of teachers to approach this Court arose, because consequent upon the issue of G.O.Ms.No.1667 dated 5-8-1981, the authorities seemed to be withholding the grants to which the private schools were otherwise entitled to. Some of these petitions came up before Ramanujam, J. who on 10-11-1982 passed a common order in W.P.Nos.10817 of 1981 and 6520 and 6521 of 1982. The learned Judge took the view that on the relevant date, i.e. 5-8-1981, there was a valid evaluation made by the Director of School Education under Rule 14 of the Education Rules of the certificates issued by the Karnataka Board as equivalent to the similar certificates issued by the State of Tamil Nadu and so long as that evaluation continued to subsist, the petitioners were entitled to be considered for appointment in the State of Tamil Nadu, and their applications could not be rejected merely on the ground that they were holders of the Karnataka State Teachers Training Certificates. The learned Judge found that the evaluation of the petitioners' certificates had been made long before the issue of G.O.Ms.No.1667, and that G.O. did not specifically say that the evaluations already made will stand wiped out. The learned Judge therefore took the view, that the State authorities could not ignore the earlier evaluations without cancelling or setting aside the same after giving notice to the persons concerned. Consequently the order dated 14-8-1981 under which instructions were given by the Director consequent upon the issue of the G.O. dated 5-8-1981 to the effect that Inspecting Officers should not approve appointment of Karnataka State Teachers Certificate-holders as Secondary Grade Teachers in Middle or Higher Elementary

Schools till the candidates possessing Secondary Grade or Senior Basic Grade Training School Teachers Certificates issued by the Director of Government Examinations, Madras are appointed was quashed.

10. In these petitions we are now concerned with the other two categories of teachers. Out of a large number of teachers who have secured their certificates a very small number of teachers have secured the certificates after 5-8-1981; but in none of these cases have the certificates been evaluated obviously in view of G.O.Ms.No.1667 dated 5-8-1981. These writ petitions have been pending for quite some time. During the pendency of these writ petitions, the Government came up with another G.O.Ms.No.1236 dated 17-9-1984. By this G.O. the Government notified that they had examined the matter carefully with regard to the equivalence of the Karnataka certificate with the T.S.L.C. and laid down certain criteria whcih the Director of School Education was to observe while evaluating the Karnataka State Teachers Training certificates. These criteria were as follows:-

"(i) Teachers Training Certificates holders of Karnataka State should have passed their S.S.L.C. in Tamil Medium with Tamil as I language or should have taken Tamil as I language in S.S.L.C. if they have studied in English Medium.

(ii) They should have obtained 50% of marks in aggregate in their S.S.L.C. as in the case of Teachers Training Certificate-holders of Tamil Nadu;

(iii) They should have obtained 50% of marks in each subject in their Teacher Training Certificate as in the case of Teacher Training Certificate-holders of Tamil Nadu.

(iv) If they studied in other than Tamil Medium in their S.S.L.C. as well as Teachers Training Certificates and satisfied the conditions 283 their Certificate may be evaluated with a condition that they are eligible for appointment as Secondary Grade Teachers in Tamil Nadu only in Schools where medium of instructions is other than Tamil.

The Government also permit the Director of School Education to apply the above conditions while evaluating the Teachers Training Certificates of all other States in order to ensure uniformity and consistency."

11. When this G.O. came to be issued, the stand taken by the State Government was, that all requests for evaluation of the Karnataka Certificates which were pending on 17-9-1984 would be considered in accordance with the conditions laid down in G.O.Ms.No.1236. The teachers were obviously aggrieved by this stand and they were therefore given an opportunity to amend the writ petitions, if necessary, and state the grounds on which they were entitled to challenge the G.O. dated 17-9-1984. Additional affidavits have been filed in some cases which raise a challenge basically to what is described as retrospective effect of the G.O. dated 17-9-1984. We shall consider this a little later.

12. It is however, obvious that merely by issuing G.O.Ms.No.1236, dated 17-9-1984, the petitioners' main grievance that they were entitled to have their Karnataka Certificates declared as being equivalent to the T.S.L.C. does not cease to survive; and we have, therefore, heard the petitioners on the validity of both G.O.Ms.No.1667 dated 5-8-1981 and G.O.Ms.No.1236 dated 17-9-1984. Learned Counsel appearing for the petitioners, namely, Mr.Martin, Miss.Anna Mathew, Mr.Balasubramanian and Mr.Balasundaram were heard. In addition, we also heard Mr.Padmanabha Rao who appeared in W.P.No.8156 of 1983 in which also the validity of G.O.Ms.No.1236 dated 17-9-1984 is challenged.

13. Mr.N.R.Chandran, the Additional Government Pleader has appeared for the Government in support of the stand that the Government was entitled to prescribe standards or criteria on which a Karnataka Certificate could be decided

as being equivalent to T.S.L.C. He was supported by Mr.Balasundaram, who is appearing for the Association of Unemployed Teachers in Tamil Nadu which had filed W.P.No.8800 of 1984, making a grievance that the education authorities were not implementing G.O.Ms.No. 1667, dated 5-8-1981 and a *Mandamus* should therefore, be issued to the Government to give effect to G.O.Ms.No. 1667 dated 5-8-1981. As a matter of fact, the mandate asked for is in positive terms that the Director of School Education, the Chief Education Officer and the State of Tamil Nadu should not equate the Karnataka certificate with that of Tamil Nadu certificate for appointment to Secondary Schools in Tamil Nadu.

14. Learned counsel appearing on behalf of the petitioners have contended that the real intent and purpose of issuing G.O.Ms.No.1667, dated 5-8-1981 was to give preference to unemployed teachers who held the Tamil Nadu certificate but were not being appointed and that all appointments were being made from among the teachers who had obtained the Karnataka certificates. Reliance was placed on the counter-affidavit filed on behalf of the State Government in which according to the learned counsel the fact that Karnataka Certificate was equivalent to the Tamil Nadu Certificate was accepted. According to the learned Counsel, what was intended to be achieved by the G.O.Ms.No.1667, dated 5-8-1981 was to wipe out unemployment of teachers from Tamil Nadu and it could not be a valid criterion for not evaluating the Karnataka Certificate of the teachers. The learned counsel also contended that the G.O. dated 17-9-1984 was really intended to carry out the purpose and object with which the 1981 G.O. was issued, and if the G.O. dated 5-8-1981 was quashed, the G.O. dated 17-9-1984 was also liable to be quashed. A large part of the argument urged before us was on the footing that it was not open to the Government by an executive order like the G.O. dated 17-9-1984, to give it a retrospective effect so as to adversely affect the rights of teachers who had obtained Karnataka Certificates and who were entitled to have their certificates evaluated, because it had always been treated as being equivalent to the Tamil Nadu certificate in the past. The learned counsel appearing on behalf of the petitioners, however, very fairly conceded that if the Tamil Nadu Government wanted to lay down guidelines for the purposes of ascertaining the equivalance of Karnataka certificate with the Tamil Nadu certificate, it is undoubtedly open to the Tamil Nadu Government to do so, but contended that this could be done only prospectively, with the result that only certificates obtained after 17-9-1984 could be dealt with on the footing of the criteria laid down in the G.O. dated 17-9-1964. We shall now consider these contentions.

15. At the very outset, it is necessary to properly appreciate the G.O. dated 5-8-1981 in the light of the counter affidavit which has been filed by the State. Undoubtedly, W.P.Nos.10718 and 10909 of 1981 are on board for hearing. Before going to the counter affidavit, it is necessary to scrutinise carefully the G.O. dated 5-8-1981. In the first paragraph of the G.O. reference is made to the fact that the Director of School Education has indicated that the Karnataka State Teachers Training Certificate is not equivalent to the certificate issued by the State of Tamil Nadu. In the same paragraph, reference is made to the suggestion made by the Director of School Education that suitable instructions might be issued to stop the appointment of teachers trained in Karnataka State in schools situated in Tamil Nadu, until the number of unemployed Secondary Grade Teachers trained in Tamil Nadu is wiped out. In the same paragraph the request of the Director is noted by which he asked for permission to stop the evaluation of the certificates with immediate effect. Carefully read, it cannot be seriously doubted that the Director of School Education had indicated to the Government that the Karnataka Certificate is not equivalent to the Tamil Nadu Certificate. But when the

G.O. made reference to the instructions which were sought by the Director, it appears that the instructions were sought not with a view to stop the evaluation of the Karnataka certificate permanently, but the evaluation was requested to be stopped for a certain period of time; and as the G.O. itself put, this period of time was "until the number of enemployed Secondary Grade Teachers trained in Tamil Nadu is wiped out." This indicates that even according to the Director, if the teachers in Tamil Nadu could be absorbed, then even he did not see any difficulty in appointing teachers holding Karnataka certificates. When we go to the second paragraph of the G.O. it is important to bear in mind that what the Government permitted the Director to do was "to defer the evaluation of the Teachers Training Certificate of Karnataka State wtih immediate effect." This clearly indicates that there was no ban on the evaluation of the Karnataka certificates, but the evaluation was being merely postponed. As if to make the matter clear, in the last sentence in the G.O. what the Director was asked to do is to issue necessary instructions "to defer appointment of Karnataka State Teachers Certificates-holders as Secondary Grade Teachers ... till the candidates possessing Secondary Grade or Senior Basic Grade Training School Teachers Certificates issued by the Director of Government Examinations, Madras are appointed. The direction to defer the evaluation was, therefore, to be operative only as long as teachers holding the Tamil Nadu certificate were not appointed. We do not see how the operative part of the G.O. dated 5-8-1981 can be construed as even remetely suggesting that the Government had accepted the suggestion of the Director that the Karnataka certificate should not be treated as being equivalent to the Tamil Nadu certificate. As a matter of fact, indication is to the contrary, because if the Karnataka Certificate-holders could be appointed after the un-employed teachers holding Tamil Nadu Certificates were all provided for this could not have been done unless the Karnataka Certificate was treated as being equivalent to the Tamil Nadu certificate for the purposes of Annexure V. We are, therefore, unable to read the G.O. dated 5-8-1981 as containing the decision of the State Government that the Karnataka Certificate ceased to be equivalent to the Tamil Nadu Certificate.

16. If there is any doubt about the object and effect of this G.O. dated 5-8-1981, the matter stands clarified by the averments made in the counter affidavit filed the Writ Petitions where an express challenge was made to G.O. dated 5-8-1981. As if to pin-point the controversy involved, in most unmistakable and unambiguous terms, the counter affidavit in paragraph 2 stated as follows:

> " The salient point governing the whole issue is that while thousands of candidates who were regularly trained in Tamil Nadu are unemployed, persons who took the training in Karnataka are appointed as teachers. If this is allowed to continue, all the Tamil Nadu trained teachers will never get teachers jobs and they will be put to hardship."

These averments give an indication as to what was at the back of the mind of the authorities, when they issued G.O. dated 5-8-1981. They did not question any equivalance between the two certificates as a major issue, but the salient point even according to them was that, if Karnataka certificate-holders were given appointments in Tamil Nadu, then teachers who hold Tamil Nadu certificates, of which category there were a large number would never be appointed. The whole object of this G.O. dated 5-8-1981 was clearly to put a ban on Karnataka State Certificates-holders from being appointed in posts for which the Government wanted the unemployed teachers in Tamil Nadu to be appointed, an approach which is wholly contrary to the guarantee of equality of opportunity in the matter of employment found in Article 16 of the Constitution of India. In paragraph 7 of the said counter-affidavit, there

is a clear admission that the Karnataka Certificate has been treated as equivalent to the Teachers Training Certificate of Secondary Grade issued by the authorities of Tamil Nadu. A contention is raised by the petitioners that both these certificates have been treated as equivalent of each other. While dealing with this contention, the averment in paragraph 7 is, "it is submitted that though these certificates are equivalent to that of secondary grade of Tamil Nadu, evaluation has been stopped only for reason stated in para 4 and evaluation is not a formal act as alleged. In the same paragraph it is further averred as follows:

> "When teachers were not available in Tamil Nadu teachers from other States came and they were evaluated. Now with a glut in Tamil Nadu with thousands of unemployed teachers, it is the duty of the Government to regulate when particularly it was even brought to their notice that Karnataka Certificates are actually inferior academically as explained above and States like Kerala are taking very serious action on the same issue in this State."

17. Reference is undoubtedly made in paragraph 4 to the effect that there is a difference between the certificates issued in Tamil Nadu and those issued in Karnataka. This itself lies, according to the affidavit in the fact that the educational qualification for admission to the Secondary Grade Training, though in both States is S.S.L.C. in so far as Tamil Nadu is concerned, the minimum marks for admission in Teachers Training Institutes is 300 in S.S.L.C. the minimum passing marks are 50% and the syllabus in Tamil Nadu lays emphasis on Tamil language as the medium of instruction while in Karnataka there is no minimum prescribed for admission, the minimum passing marks are 35% and there is no emphasis on Tamil language. While we cannot dispute the right of the educational authorities and, indeed of the State Government, to lay down the criteria on considerations which must essentially be academic on which the question of equivalence of the two certificates can be properly determined, we are primarily concerned with the question, whether the G.O. dated 5-8-1981 can be read as containing a decision of the State Government not to recognise the Karnataka certificates after 5-8-1981. That there is a difference in academic standards or with regard to the passing marks or with regard to minimum marks for seeking admission to the certificate course, may be a good ground for reviewing the equivalence which held the field for almost 20 years; but what we are concerned with is, whether the Government has reached the decision not to equate the two certificates on 5-8-1981. Even in paragraph 4, emphasis is laid on the plight of the unemployed teachers who could not get employment in Tamil Nadu with the result that the Government was forced to restrict the admissions in the Teachers Training Institutes not only numerically but even periodwise; the admissions were made only in alternate years. It is obvious from the averments made in the counter affidavit that the Government was impelled to take the decision of stopping evaluation of the Karnataka certificates only because there is a large number of unemployed teachers with T.S.L.Cs. and not because it is not equivalent. In W.P.No.8156/83, the letter of the Director of School Education dated 30-12-81 is produced in which he states that Karnataka certificate is equivalent to T.S.L.C. but in view of G.O.No.1667 under orders of Government evaluation is stopped. We may also refer to the averments in paragraph 10 of the counter affidavit in which the Government really came out with the object with which G.O.Ms.No.1667, was issued. Paragraph 10 of the counter-affidavit reads as follows:-

> It is most respectfully submitted that orders in G.O.Ms.No.1667, Education, dated 5-8-81 were issued for the welfare of about 15,000 unemployed Secondary Grade trainees in Tamil Nadu; Government issued orders only to stop evaluation for the teacher's

certificate of the Higher Examination of Karnataka and Instructions were issued not to approve such appointments and also to give preference to the holders of the Secondary Grade training in Tamil Nadu, as the policy of the Government is to solve the unemployment problem."

These averments in paragraph 10 justify the construction which we have placed on the real intent and purpose and effect of G.O.Ms.No.1667. The effect of G.O.Ms.No.1667 was, therefore, not dereognition of the equivalence of the Karnataka Certificate with the Tamil Nadu Certificate, but merely to postpone the evaluation until the unemployed teachers who held the Tamil Nadu certificate had secured employment. As already pointed out, such an approach would be wholly impermissible. Once the two certificates are treated as equivalent of each other, the State could not show any preference to any particular class of teachers merely on the ground that they were holders of certificates issued by an institution in Tamil Nadu.

18. Once we place this construction on the G.O. dated 5-8-1981, the natural result would be that equivalence of the Karnataka certificate with the Tamil Nadu certificate would continue to be effective till 17-9-1984 when the G.O.Ms.No.1236 was issued. The only impediment for the evaluation of the certificates of the Karnataka certificate holders was G.O. dated 5-8-1981. Once that is out of the way in view of the construction placed upon it, then obviously whatever certificates were submitted to the State Government till 17-9-1984 would have to be dealt with on the footing that the Karnataka certificate was equivalent with the Tamil Nadu certificate.

19. The learned Additional Government Pleader has referred us to certain decisions in support of the proposition that it is open to the State Government to deal with the question of equivalence of two educational qualifications on the basis of a valid reason. The three decisions on which reliance was placed were, *MISS. SATHYA RAO v. UNIVERSITY OF MADRAS*, (1977)2 M.L.J.403; *MEENAKSHI SUNDARAM v. DIRECTOR OF LEGAL STUDIES*, (1981)2 M.L.J.141 and *PUNJAB UNIVERSITY v. DEVJANI CHAKRABARTI*, (1984)3 S.C.C. 612= A.I.R.1984 S.C.1444. In the University of Madras case cited supra, the question which fell for consideration before the Division Bench of this Court was, whether it was within the powers of the Syndicate of the Madras University to lay down conditions for admission; and in that context after referring to the decision in *KRUSE v. JOHNSON*, (1898)2 Q.B.91 and to another decision in *ASSOCIATED PROVINCIAL PICTURE HOUSE LTD. v. WEDNESBURY CORPORATION*, (1948)1 K.B.223, the Division Bench observed as follows:-

"The above pronouncements make it clear that a Court cannot sit in judgment as if it were an Appellate Authority over the wisdom of a particular body which made the subordinate legislation or passed the by-law or prescribed the conditions or qualifications and come to a conclusion differing from the one which that body took on the reasonableness or otherwise of such subordinate legislation, by-laws or conditions or qualifications. The principle is that only when it is established that no reasonable person could have come to such a conclusion or could have made such a by-law or subordinate legislation, the Court can interfere. It should not be forgotten that in the present case the body which was entrusted with the power of the Syndicate of the University which may be considered to be an expert body in relation to matters of education. Whether one considered it to be an expert body or not, the legislature thought fit to consider such a body as an expert body on matters relating to education and has chosen to confer the power on such a body. Therefore unless the Court is convinced that the conditions prescribed in the present case are so unreasonable as no reasonable person would have come to or are alien or foreign

to the purpose for which the power was conferred on the Syndicate, the Court cannot hold that the conditions imposed by the Syndicate are unreasonable as to avoid the same."

20. There can be hardly any quarrel with the view taken by the Division Bench. It is not the case of the petitioners, nor would it be possible to go into the querstion if it is raised that this Court must go into the question as to whether the equivalence has been made properly or not, that is, whether a certificate or degree granted by one educational institution stands a fair comparison in academic quality and excellence with the certificate or degree granted by another educational instiution, be it a University or Board, as that is a matter which is within the special competence of the educational authorities. The educational authorities are alone the proper authorities who can compare the nature of the educational course and the nature of the instruction on the basis of which the certificates or degrees are granted; and unless it is shown that a decision of the educational authorities is so perverse or so unreasonable or arbitrary that no reasonable person would arrive at such a decision, this Court would not interfere with such decision on academic matters under Article 226 of the Constitution of India. As already observed, so far as the further criterion given in the G.O. dated 17-9-1984 are concerned, there is no challenge by any of the petitioners. The only challenge made was that, all pending applications for evaluation should not be decided in accordance with the criteria laid down on 17-9-1984. We have already pointed out that when the decision of the State Government to treat the equivalence which so far was operative as being in-operative, is taken for the first time on 17-9-1984, then the Karnataka certificate holders had a right to have their certificates evaluated on the basis of such equivalence. It would be only in cases where evaluation is necessary after 17-9-1984, that the criteria laid down in G.O.Ms. No.1236 would have to be considered.

21. The other decision in *MEENAKSHI SUNDARAM v. DIRECTOR OF LEGAL STUDIES*, (1981)2 M.L.J.141 turned on whether a degree obtained on the basis of a correspondence course could be taken into account for the purposes of admission to the B.L. course. The petitioner in that case held a B.G.L. Degree of Madurai Kamaraj University, obtained after pursuing the correspondence course. The rules prescribed by the Bar Council permitted only a student who had obtained a B.C.L. Degree after attending regular classes to take the B.L.course. This was challenged on the ground of violation of Article 14 and the challenge was negatived. It was held that the rules were well within the rule-making power of the Bar Council. While dismissing the petition, the Division Bench observed that the degree obtained after pursuing the correspondence course cannot be equated, in all circumstances, and in all respects with a degree obtained after attending regular classes, and, if a particular body or organisation or association treats the two degrees as equal for certain purposes, that cannot make the two degrees equal in reality or for all purposes. We do not see the relevancy of this decision, so far as the facts of the present case are concerned.

22. The one and the only purpose for which equivalence was claimed was the purpose of obtaining employment as teacher. It is not the case either of the petitioners or of the State Government that the Karnataka certificate is equivalent to the Tamil Nadu certificate for some purposes and not for other purposes. Either the one is equivalent of the other or it is not for the purpose of appointment as a teacher in Tamil Nadu.

23. In the third decision of the Supreme Court, *viz.*, *PUNJAB UNIVERSITY v. DEVJANI CHAKRABARTI*, (1984)3 S.C.C. 612= A.I.R.1984 S.C.1444 the Court was concerned with the decision of the Punjab University which had earlier equated the 12th standard examination with Part I Examination of the Degree

course, while subsequently the same examination was equated with Pre-University Examination; and the Court held that subsequent decisions were prospective and valid. This decision which essentially turned on point of time with reference to whether the decision of the Syndicate was operative, is not of any assistance to the learned Government Pleader.

24. It was contended by Mr.Chandran that, if certificates which were submitted on or after 5-8-1981 are evaluated on the basis of the criteria laid down in G.O.Ms.No.1236, dated 17-9-1984, no grievance can be made that the G.O. dated 17-9-1984 is having a retrospective effect. According to the learned counsel, no vested right is being taken away merely because the certificates are of a prior date; and the application of the rules is prospective in character, because the determination of equivalence is only being done after 17-9-1984. So far as the concept of retrospective effect of either legislation or an executive order is concerned, the position is well settled. A statute is said to be retrospective only when it takes away a vested right retrospectively. But it is also well established that a statute is not retrospective merely because it affects the existing rights; nor is it retrospective merely because a part of the requisites for its action is drawn from a time antecedent to its passing. Mr.Chandran, obviously has the latter concept in mind when he contends that a certificate may have been secured prior to 17-9-1984, but merely on that ground, the G.O. cannot be said to be giving effect retrospectively. We have already pointed out that as the decision to go back on the equivalence is contained in G.O. dated 17-9-1984, the decision must be taken to have been reached only on that date. Till that date, equivalence of the two certificates having not been disturbed, there was clearly a vested right in the certificate-holders of Karnataka, which certificates were already lying with the educational authorities for their evaluation on the basis of equivalence. Any applicability of the criteria laid down in the G.O. dated 17-9-1984 to them would clearly adversely affect the rights of the Karnataka certificate-holders.

25. As part of the attack on the validity of G.O.Ms.No.1667, dated 5-8-1981 and G.O.Ms.No.1236 dated 17-9-1984, Mr.Padmanabha Rao has contended that these G.Os. purport to amend the statutory Rules of 1974 which the State Government is not compentent to do. The argument was that wherever it was intended to indicate that there was an institutional preference, a specific mention is made in service rules; and our attention was invited to Tamil Nadu State and Subordinate Services Rules, in which while specifying qualifications, it was specifically laid down in respect of certain instructions that degrees of certain Universities would be necessary. For example, in Rule 19 of Part II - General Rules which prescribes special qualifications, there is an Explanation which provides that in cases where the Special Rules prescribe a degree or diploma as a qualification then a decree or diploma granted by any of the Universities or Institutions recognised by the University Grants Commission for the purpose of its grant mentioned in Schedule II to this part shall be recognised as the qualification. Our attention was also invited to the advertisement of the Public Service Commission in W.P.No.8156 of 1983 in which while advertising the posts of Language Pandits, the qualification prescribed was "a degree of any University in the State in the language concerned (namely, Tamil, Telugu, Malayalam or Urdu) as the main subject". The argument appears to be that, when the educational authorities of the State of Tamil Nadu declined to consider a Karnataka certificate, they are, in fact, introducing in Annexure V something which is not permitted, because one of the qualifications is that the teacher must have a T.S.L.C. of Secondary Grade or its equivalent. Now, apart from the merits or effect of the two impugned G.Os., it is not possible for us to accept

the contention that if the educational authorities of the State Government justifiably declined to treat any particular certificate as not being equivalent to the T.S.L.C. of Secondary Grade, they purport to amend the Rules of 1974 or the Annexure V. All that the Rules prescribe is that, a teacher for appointment as a secondary grade teacher must held two qualifications. He must hold a Secondary School Leaving Certificate and he must hold the T.S.L.C. of Secondary Grade or any other equivalent certificate. This is implict in the power to equate a certificate which is not T.S.L.C. of Secondary Grade with the certificate which is issued by Commissioner for Government examinations in Tamil Nadu. Such power by its very nature is executive in character, because once an equivalent has to be determined that function has to be performed by the executive authorities, though such a decision of treating a certificate or treating a certificate issued by an authority other than in Tamil Nadu may be open to challenge on permissible grounds. Since it was clearly permissible for the State Government and the educational authorities to decide the question of equivalence, it is not necessary to discuss the decision of the Supreme Court in *STATE OF HARYANA v. SHAMSHERJANG*, (1973)1 S.C.R.249= A.I.R.1972 S.C.1546 in which the Supreme Court held that by an executive order a rule made by the Governor under Article 309 of the Constitution of India cannot be amended.

26. Some decisions were cited, before us by Mr.Padmanabha Rao in support of the argument that the issuance of the two impugned averment orders suffer from the vice of arbitrariness and any attempt to give effect to the impugned G.O.Ms.No.1667, dated 5-8-1981 would result in violation of Articles 14 and 16 of the Constitution and any attempt to give retrospective effect to the second G.O.Ms.No.1236 dated 17-9-1984 would also not be permissible. It is now well established that any arbitrary exercise of power *per se* would result in denial of equality of protection of the laws. (See *A.L.KALRA v. THE PROJECT AND EQUIPMENT CORPORATION OF INDIA LTD.*, (1984) Lab.I.C.961= (1984)3 S.C.C.316= A.I.R.1984 S.C.1361.

27. This proposition is also laid down in three other decisions which have been cited, namely, *E.P.ROYAPPA v. STATE OF TAMIL NADU AND ANOTHER*, (1974) Lab. I.C.427= (1974)4 S.C.C.3= A.I.R.1974 S.C.555; *M/s. KASTURLAL LAKSHMI REDDY etc. v. THE STATE OF JAMMU AND KASHMIR AND ANOTHER*, (1980)4 S.C.C.1= A.I.R.1980 S.C.1992 and *RAMANA DAYARAM SHETTY v. THE INTERNATIONAL AIR PORT AUTHORITY OF INDIA AND OTHERS*, (1979)3 S.C.C.489= (1979)2 Lab.L.J.217= A.I.R.1979 S.C.1628. However, in view of the fact that we have already indicated that the G.O. dated 5-8-1981 cannot affect the rights of the teachers who have already obtained certificates and applied for their evaluation and that G.O.Ms.No.1236 dated 17-9-1984 cannot be given retrospective effect, it is not necessary to discuss the authorities cited by Mr.Padmanabha Rao.

28. We may, however, make it clear that so far as the impugned G.O. dated 17-9-1984 is concerned, it was clearly open to the State Government to lay down the fresh criteria for determining the question of equivalance. In the counter affidavit to which we have referred above, the circumstances which necessitated the issue of the criteria in the impugned G.O. dated 17-9-1984 have been culled out. The averments in the counter affidavit point out the differences between the requirements of a certificate issued by the Teacher Training Institute in Tamil Nadu and similar in Karnataka. A comparative statement which highlights those differences, which is set out in the counter affidavit, is reproduced below:

TAMIL NADU	KARNATAKA
A. Minimum marks for admission in Teachers Training Institutes is 300 in S.S.L.C.	No minimum marks for admission. Any one gets it for the mere asking.

b. Minimum marks for pass is 50%.	Minimum marks for pass 35%.
c. Syllabi different Tamil Nadu syllabi emphasises Tamil language as the medium of instruction in Elementary Schools.	

29. The first 2 criteria for admission to the Institutes in Tamil Nadu and Institutes in Karnataka have a direct impact on the quality of teachers who obtained those certificates. If the two certificates have to be equated, then there must be a similarity in the qualitative performance which is a qualifying factor for obtaining such certificates. In Tamil Nadu, the minimum marks for admission in the Teachers Training Institutes is 50%, that is 300 in the Secondary School Leaving Certificate examination, while merely obtaining passing marks is enough for admission in Karnataka, which has a direct impact on the educational standards of teachers who undergo the training course. Similarly, in Tamil Nadu the passing marks are 50% while the minimum passing marks in Karnataka are 35%. This again has relevance on the question as to whether the two certificates must be treated as equivalent to one another. Teachers in Tamil Nadu essentially cater to education of children whose language is Tamil, and since Tamil is the medium of instruction in elementary schools, the question as to whether syllabus of the training course lays emphasis on Tamil as the language or medium of instruction is also a relevant consideration. By its very nature, the language of Karnataka being not Tamil, it is not possible that there would be emphasis on Tamil language with the result that, when catering to the educational needs of students whose mother tongue is Tamil, putting them into the hands of teachers who may not be trained to teach in Tamil is bound to have some adverse effect.

30. All these three considerations appear to be eminently proper, which have now been considered, and while laying down the criteria it is obvious that second and third criteria, by insisting upon 50% of marks in the aggregate in the S.S.L.C. and 50% of marks in each subject in the Teachers Training Certificate examination, were intended to bring on par such teachers with the teachers who were issued certificates from the Tamil Nadu Institutes. The emphasis on Tamil has also been achieved by clauses 1 and 4 in the criteria, which while giving effect to the concept of equivalence provide that the Karnataka certificate-holders who have passed their S.S.L.C. in Tamil Medium with Tamil as the first language or have taken Tamil as first language in T.S.L.C., if they have studied in English medium, will be recognised in schools, where the medium of instruction is Tamil. Under clause 4 it is provided that if such teachers holding the Karnataka certificate have studied in a medium other than Tamil medium in their S.S.L.C. as well as Teachers Training Certificate they satisfy second and third conditions, namely, securing 50% of the marks in the aggregate and 50% of the marks in each of the subjects in Teacher Training Certificate examination, and then their recognition will be restricted only as regards eligibility for appointment as secondary grade teachers in Tamil Nadu only in schools limited to instructional needs of other than Tamil students and as such each one of those four criteria has clear nexus with the equivalence of the certificates issued by the Tamil Nadu Institutes.

31. In W.P.No.7286 of 1982 the certiorarified mandamus sought is that the second respondent should be directed to approve with evaluation the appointment of the petitioner as a secondary grade teacher in R.C.Middle School in Siluvaipatti, Tuticorin. In W.P.No.3347 of 1982 the relief sought is that a mandamus should be issued to the second respondent, that is the Director of School Education, Madras to evaluate the petitioner's teachers certificate issued by the Karnataka Board of

Secondary Education. The petitioners in the above two petitions will accordingly be entitled to that mandamus as prayed for. Both these petitions are allowed.

32. Mr.Balasubramaniam who appears in W.P.No.255 of 1984 has raised a contention which, however, does not seem to be raised even by the Government or the educational authorities. He has pointed out that when condition No.3 prescribes that Karnataka certificate-holders should have obtained 50% of the marks in each subject in their teacher training certificate, there might be some difficulty in ascertaining whether these 50% marks have to be obtained separately in internal and external examinations. In the mark sheet examinations appear to be internal and external. The fourth subject really consists of two subjects, namely Science and Mathematics. Reading criteria No.3, it is obvious that the requirement is that 50% marks must be obtained in each subject. If the total number of marks of each subject even according to the mark list is made up of two elements namely, internal and external marks, then it is obvious, and indeed it is not disputed by the Additional Government Pleader, that this total of the marks obtained at the internal and external examinations will have to be taken into consideration for determining whether criteria No.3 is satisfied. Having regard to the view which we have taken, the two petitioners in W.P.Nos. 3347 of 1983 and 255 of 1984 are entitled to the mandamus soguht by them.

33. The overall effect of our decision, therefore, is that G.O.Ms.No.166, Education dated 5-8-1981 and the communication which was issued by the Director of School Education on 14-8-1981 to the Inspecting Officers not to approve the appointment of Karnataka State teacher certificate holders as Secondary Grade Teachers in Middle or Higher Schools till the candidates possessing Secondary Grade or Senior Basic Grade Training School Teachers Certificate issued by the Director of Government Examinations are appointed, ceases to be operative and is quashed. Equally the subsequent proceeding dated 11-9-1981 issued based on it, is also quashed.

34. According to the learned counsel for the petitioners appearing in several petitions, there are cases in which the Karnataka certificates held by the respective teachers are still with the educational authorities, but they have declined to evaluate them, or in some cases such certificates were sent by the schools for evaluation to the educational authorities and they have been returned to the school authorities and still other cases wherein having regard to the communication and the attitude adopted by the educational authorities the Certificates were still lying with the school authorities, and have not been forwarded because they were not being evaluated by the department. In all these three categories of cases the certificate holders will have a right to have their certificate declared equivalent to the Tamil Nadu Certificates, provided the certificates have been handed over prior to 17-9-1984.

35. Hence all these writ petitions are allowed only regarding the aspect of evaluation of Karnataka certificate, as indicated above. No costs.

R.S. ----- *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *K.Shanmugham, J.*

*S.A.No.49 of 1979 and C.M.P.No.14234 of 1983. *29th August, 1984.*

G.Kalyana Krishnaswamy Naidu *Appellant**

v.

State of Tamil Nadu represented by the Collector of Coimbatore and others *Respondents.*

(A) Tamil Nadu Estates Act (30 of 1963), section 3 - Scope and effect - Person seeking declaration and injunction on foot of absolute title - Title negatived - Claim of relief as usufructuary mortgagee in appellate Court - Plea not raised nor evidence led in trial Court - Plea cannot be raised in the appellate Court.

(B) Pleadings - Practice - Plea not raised in trial Court not raisable ordinarily in appellate Court.

On the question whether the grant of patta under Tamil Nadu Act 30 of 1963 in 1965 in favour of a village temple will take away the rights to possession of a person as an usufructuary mortgagee of the property which was executed in 1880 without the usufructuary mortgage being re-deemed,

Held:- A claimant will be entitled to continue in possession if he had perfected his limited right as possessory mortgagee provided there were necessary pleadings by both the parties and issue taken; besides evidence should have been adduced. In certain circumstances a decree can be passed on the strength of the plaintiff's possession though it is not specifically made a ground of relief.

If the temple in the present case was to be bound by the bogyam of 1880 there must have been a specific pleading that it was for the benefit of the temple and such a pleading should have been proved by evidence. Where the plea had not been taken in any form before the trial Court and there is no trace of it in the pleadings of the party and the trial Court does not even refer to it in its judgment it is not open to the party to take such a plea before the appellate Court. In the present case what could be reasonably inferred is that the bogyam was not for legal necessity, that the alienation enured during the lifetime of the alienor and thereafter from 1919, the alienee's possession become adverse to the temple. By virtue of section 3 of the Tamil Nadu Estates Act 30 of 1963 the right, if any, acquired by the bogyamdar came to vest in the Government. Hence the claimant in the present case can have no title to the property.*[Paras.6 and 9]*

Cases referred to:-

Seethalakshmi Ammal v. G.Krishnaswami Rao, I.L.R. (1961) Mad.265 (D.B.); *Sk.M.Muhammed Mustafa Marakayar v. Udayanachiammal,* I.L.R. (1968)1 Mad.728 (D.B.); *P.V. Karuppanan Ambalam v. Pandari Sundara Raja Aiyar,* (1939)2 M.L.J.645: A.I.R.1940 Mad.71; *Subramania Gurukal v. Arulmighu Thirumaleswaraswamy Deity,* (1984) 97 L.W.243: A.I.R.1984 Mad.217; *Muthuswami Gurukal v. Aiyaswami Thevar,* I.L.R. (1964)1 Mad.566; *Venkateswara Sarma, styled Gnanasivacharya Swamigal v. S.N.Venkatesa Ayyar,* (1941)1 M.L.J.644: I.L.R. (1941) Mad.599: A.I.R.1941 Mad. 449 (F.B.); *Lachhmi Narain v. Kalyan,* A.I.R.1960 Raj.1; *Sri Sarangadevar Peria Matam v. Ramaswamy Gounder,* (1967)1 M.L.J. (S.C.) 154: (1967)1 An.W.R. (S.C) 154: (1967)1 S.C.J.734: (1966)1 S.C.R.908: A.I.R.1966 S.C.1603; *Shankarlal Narayandas Mundade v. The New Mofussil Company Ltd.,* (1946)73 I.A.98(2): (1946)2 M.L.J.259: A.I.R.1946 P.C.97; *Kokila v. K.M.Rajabathar,* (1957)2 M.L.J.128: I.L.R. (1957) Mad.968: A.I.R.1957 Mad.470; *The idol of Sri Ranganathaswamy Devasthanam, Srirangam v. Madavan,* (1984)1 M.L.J.43.

Appeal against the decree of the Additional District Court, Coimbatore dated 3-5-1978 in Appeal Suit No.243 of 1976 preferred against the decree

of the Court of the II Additional Subordinate Judge, Coimbatore in O.S.No.189 of 1975, etc.

The Court delivered the following

JUDGMENT:- The plaintiff who lost in both the Courts below is the appellant. He filed O.S.No.189 of 1975 in the Court of the Subordinate Judge, Coimbatore for declaration of title to suit property and for injunction to restrain the defendants from interfering with the plaintiff's possession and enjoyment. The trial Court framed six issues and held that the plaintiff has no right in the suit property; that the plaintiff is not entitled to any declaration or injunction; that the suit is not bad for want of notice under section 80 of the Civil Procedure Code; that the suit is not barred by *res judicata* and that the Court has jurisdiction to entertain the suit and ultimately dismissed the suit with costs.

2. On appeal, the learned Additional District Judge, Coimbatore (West) framed three points for determination viz.,

1. Whether plaintiff has title to the suit property?

2. Whether plaintiff is in possession of the suit property?

3. Whether plaintiff is entitled to the declaration and injunction prayed for?

Ultimately the learned Judge agreed with the trial Court that the appellant has no title to the suit property and is not entitled to any declaration or injunction. I must straightaway point out that the judgment of the final court of fact is rather cursory. Be that as it may, the substantial question of law that was formulated at the time of admission of the Appeal is:

> "Whether the grant of patta granted under Tamil Nadu Act 30 of 1963 in 1965 in favour of one Chavadi vinayagar Temple at Iyampalayam of which respondents 3 to 6 are the trustees will take away the right to possession of the plaintiff-appellant as an usufructuary mortgagee of the property which came to be executed in the year 1880 without the usufructuary mortgage being redeemed."

3. At the outset it is essential to point out that Mr.T.Rangaswamy Iyengar, learned counsel for the appellant had unequivocally stated that the appellant accepts the title of the temple in the suit property but then the appellant is claiming only as a bogyamdar vis-a-vis the suit property. The appellant's case is that both the varams belong to the temple; that being a small temple, the poojari was also acting as a trustee for the temple; that after the demise of Suppandi his wife Suppakkal came to act as a trustee as there is no impediment in the Hindu Law for a woman to act as a trustee; and in the capacity of trustee, she executed a bogyam deed in favour of one Jangama Naicker and that the plaintiff as the sole heir, is entitled to the suit property. The bogyam deed is dated 22-9-1980, evidenced under registration copy Exhibit A-1. It is the contention of the learned Counsel for the appellant that according to the then law of limitation the mortgage ought to have been redeemed within six years therefrom, that as it was not redeemed, the appellant had acquired title as bogyamdar by adverse possession, since the expiry of twelve years from 22-9-1940. According to the learned counsel for the plaintiff, in the year 1952 the limited right as bogyamdar has been acquired by the plaintiff by prescription. So far as the resumption proceeding is concerned, it was not pursued on account of Tamil Nadu Act 30 of 1963 which intervened in the meanwhile. The Act had not affected the rights of the bogyamdar though under the Act absolute title in the suit property came to be vested in the Government. In support of the said contention the learned counsel invited my attention to two decisions of this court, the latter following the former, and they are: *Seethalakshmi Ammal v. G.Krishnaswami Rao and others*, I.L.R.

(1961) Madras 265 (D.B.); and *Sk.M.Muhammed Mustafa Marakayar v. Udayanachiammal and others*, I.L.R. (1968)1 Madras 728 (D.B.). It is further contended by the learned Counsel that though the appellant has claimed absolute title in this action, the Court has enough powers to mould the relief based on the facts established in the particular case and this proposition of law is sought to be supported by a decision of this Court in *P.V.Karuppanan Ambalam v. Pandari Sundara Raja Aiyar*, (1939)2 M.L.J.645= A.I.R.1940 Mad.71.

4. It is also urged by the learned Counsel for the appellant that he now claims only as a bogyamdar. It is unnecessary whether this court can examine the question of title albeit settlement officer granting patta under the Act 30 of 1963. Consequently, there is no need to be guided by the decision in *Subramania Gurukkal and others v. Arulmighu Thirumaleswaraswamy Deity, represented by the Executive Officer and another*, (1984)97 L.W.243= A.I.R. 1984 Mad.217. The learned counsel also drew my attention to a decision in *Muthuswami Gurukkal v. Aiyaswami Thevar and sixteen others*, I.L.R. (1964) Madras 566, in support of his contention that in small temples there would be a presumption that the Poojari himself was the hereditary trustee of the temple and also that there was no legal obstacle for a person functioning both as a trustee and Poojari and that in such a situation it was not likely that the interest of the temple would suffer by a person holding both the offices. He called to his aid a decision of this Court in *Venkateswara Sarma, styled Gnanasivacharya Swamigal, Matadhipathi and Guru of Perur Mel Math v. S.N.Venkatesa Ayyar and eleven others*, I.L.R. (1941) Madras 599: (1941)1 M.L.J.644: A.I.R.1941 Mad.449 (Full Bench of Five Judges) and another decision of the Rajasthan High Court in *Lachhmi Narain and another v. Kalyan and another*, A.I.R.1960 Raj.1 (Special Bench of three Judges) to sustain his argument that limitation will start immediately on the demise of the trustee who made an alienation and that any subsequent act will not stop the limitation continuing to run.

5. The immediate question is whether the point formulated at the time of admission of the second appeal and argued by the learned counsel for the appellant arises out of the pleadings in this case. It has to be noticed at this stage that in C.M.P.No.17597 of 1983, as per order dated 5-1-1984, the plaint was amended pending the second appeal and by the amendment, relief for recovery of possession was also included. Notwithstanding the above amendment, the plaintiff has claimed only absolute title by adverse possession. A reading of the amended plaint shows that according to the plaintiff, the temple was entitled to melvaram only and the plaintiff is the sole heir of his father Gurusamy Naidu, in whose favour the "Oppadai Bogyam" was conveyed under a settlement by bogyamdar Jangama Naicker, 'that he has been in exclusive possession in his own right of the suit properties and has been paying assessment on the land to the Pandarams for the last several years and after it is fully assessed, is paying the assessment to the Government so that there is no rrom for doubt that what has been granted in Inam to the temple is melvaram alone' (Paragraph 6 of the amended plaint) and also that 'the "Oppadai Bogyam" is a usufructuary mortgage and even under the law then existing the period of sixty years for redemption is over and the parties, irrespective of the fact that there is a temple, as the Pandarams have lost their right to redeem, the plaintiff has perfected his title as full owner thereof and sixty years having lapsed by 1940, and the plaintiff continued to be in possession of the property for more than twelve years from 1940 till the Minor Inams Abolition Act came into force and as such no question of anybody else having a right in the property arises their remedy having become long ago barred' (Paragraph 9 of the amended plaint). Even in paragraph 14 which relates to the reliefs, the reliefs, claimed are to declare the title of the plaintiff to the suit

property and to grant consequential injunction, in the alternative to deliver possession. Thus, it is beyond doubt that the plaintiff claimed title as full owner by adverse possession.

6. The present contention is that the plaintiff is entitled to be in possession because he had perfected the limited right as possessory mortgagee and there is no bar for such a relief being granted to the plaintiff; vide the ratio in *P.V.Karuppanan Ambalam's Case*, (1939)2 M.L.J.645= A.I.R. 1940 Mad.71. To attract the above dictum, not only should there have been necessary pleadings by both the parties but also issue should have been raised; besides, the parties should have adduced evidence. The ruling in *P.V.Karuppanan Ambalam's Case*, A.I.R.1940 Mad.71 is that though a plaintiff bases his suit on title, relief can be given on the strength of his possession alone and in certain circumstances a decree can be passed on the strength of plaintiff's possession though it is not specifically made a ground of relief. It is relevant to recall the principle of law laid down in *Sri Sarangadevar Peria Matam and another v. Ramaswamy Gounder, (Dead) by legal representatives, (1967)1 M.L.J.* (S.C) 154= (1967)1 An.W.R. (S.C.) 154= (1967)1 S.C.J.734= A.I.R.1966 S.C.1603= (1966)1 S.C.R.908. The Supreme Court has held thus, "in the absence of legal necessity, the lease of 1883 endured only during the lifetime of the previous mathathidapathi and terminated on his death in 1915, and possession thereafter of the respondent and his predecessor was adverse to the math." Therefore, if the temple were to be bound by the bogyam of 1880, there must be a specific pleading that the said bogyam was for the benefit of temple and also such a pleading is proved by evidence. Above all, the opposite party must have had reasonable notice of such a claim so as to enable the said party to put forth his defence about such a case. It is needless to point out that the burden is on the alienee and, in the instant case the appellant, not only to make such an allegation but also to adduce proof thereof. In this case, there is no reference to the legal necessity for the bogyam in the plaint - even after the amendment ordered in this Court nor is there any evidence, nor was any issue touching the subject. It would, therefore, follow that the principle enunciated by the Privy Council in *Shankarlal Narayandas Mundade v. The New Mofussil Company Limited and others*, (1946)73 I.A.98(2)= (1946)2 M.L.J.259= A.I.R.1946 P.C.97 and reiterated by this Court in *Koktla and another v. K.M.Rajabather and another*, (1957)2 M.L.J.128= I.L.R. (1957) Mad.968= A.I.R.1957 Madras 470 would govern this case. In the former case the Privy Council has ruled that where a plea in any form is not taken before the trial Court, there is no trace of it in the pleadings of the party, it is not the subject of an issue, the trial court does not refer to the plea in its judgment, nor is any evidence led with regard to it, it is not open to the party to take such a plea for the first time before the appellate Court; while this Court in the latter case had pointed out that where the point was not raised in the written statement filed by the appellant, but for the first time in the memo of appeal, it would not be just and proper that the appellants should be allowed to raise this plea in appeal when they did not choose to raise it at the trial and when the person interested, did not contest the plaintiff's claim in the Court below and had not chosen to contest his claim in appeal. Then the plaintiff is not entitled to put forward that the bogyam is for the necessity of the temple and is, therefore, binding on the temple and consequently there is still in the plaintiff a right as bogyamdar and that the same is not extinguished by the Act 30 of 1963.

7. Reverting to *P.V.Karuppanan Ambalam's Case*, (1939)2 M.L.J.645= A.I.R. 1940 Mad.71, I must say that the facts in the decided case are quite different from the facts established in this case and, therefore, the ratio therein could not be availed of by the appellant in the instant case. In that case, the suit was for a permanent injunction

restraining the appellant from interfering with the respondent's enjoyment of the suit property and in the alternative for directing the respondent to put the appellant in possession; the respondent claimed title under an Inam grant alleged to have been made to his predecessors-in-title by the Carnatic rulers for the supply of Tulasi to the Kallalagar Devasthanam; that the respondent alleged that in or about the year 1918 the trustess of the Ramalingaswami Mutt falsely set up title to the suit properties and at the instance of some mediators, the dispute with them was settled by the trustees giving what is described as a release sale deed recognising the respondent's title thereto and since then, the respondent claimed to have been in possession and enjoyment of the suit properties down to the year 1983 when the appellant disturbed his possession under colour of a sale deed obtained by him from one Singaram Pillai. The appellant naturally denied respondent's title to suit property and in turn he claimed title to one Narayana Paradesi, what was urged before the learned Judge who rendered the judgment is that when the plaintiff based his suit on title, he could not claim relief on the strength of his mere anterior possession even alternatively and that he could rely upon possession only as evidence of the title put forward by him but not as an independent ground of claim by itself. In the above background, the learned Judge observed as follows:-

"In some of these cases, the suits were no doubt dismissed on the ground that the title set up by the plaintiff was not established, and that no decree could be granted on the strength of mere possession as no possessory title had been put forward in the plaint. But I do not regard these decisions as laying down an inflexible rule that under no circumstances can a decree be passed on the strength of plaintiff's possession unless such possession is specifically made the ground of relief in the plaint."

The claim based on possession is not contradictory to the title claimed by the appellant in that case. Therefore, the learned Judge laid down the law as stated supra, but in this case the appellant would give up his case of absolute ownership but claim only a limited title as bogyamdar. I am, therefore, constrained to hold that the decision cited supra will have no application to the instant case.

8. No doubt, this Court has uniformly taken the view that the chargeholder would not be deprived of his securities over the same lands which, though they have ceased to be private lands, continue to be the property of the landholder, as held in *Seethalakshmi Ammal v. G.Krishnaswami Rao and others*, I.L.R. (1961) Madras 265 and followed in *Sk.M.Muhammed Mustafa Marakayar v. Udayanachiammal and others*, I.L.R. (1968)1 Madras 728. But in this case the requisite facts as stated above are neither alleged nor proved.

9. On the other hand, what could reasonably be inferred is that the bogyam is not for legal necessity and the resultant position as per the Supreme Court ruling in *Sri Sarangadevar Peria Matam and another v. Ramaswamy Gounder*, (1967)1 M.L.J. (S.C.)154= (1967)1 An.W.R. (S.C.)154= (1967)1 S.C.J.734= A.I.R.1966 S.C.1603 is that the alienation endured only during the lifetime of Suppakkal and that thereafter, the alienee's possession was adverse to the temple. *Venkateswara Sarma v. S.N.Venkatesa Ayyar and eleven others*, (1941)1 M.L.J.644= I.L.R. (1941) Madras 599 is another authority for the above proposition that possession after the demise of Suppakkal in 1914 was adverse to the temple. Perhaps, it is, therefore, that the plaintiff claimed full ownership in the suit property by adverse possession. Then on the advent of Tamil Nadu Estates Act XXX of 1963, the title acquired by the bogyamdar came to vest in Government (See *The Idol of Sri Ranganathaswamy Devasthanam, Srirangam, by its Executive Officer v. Mavadian and others*, (1984)1 M.L.J.43. The Division Bench has in Sri Ranganathaswamy Devas-

thanam case, ruled that all the rights including that of adverse possession will vest with the Government under section 3 of the Act, and the legislative intention was not to recognise for the purpose of the Act any claim to ryotwari patta on the basis merely of adverse possession. It would at once follow that the plaintiff has no title to the suit property.

10. The document to be received as additional piece of evidence is the death extract of Suppakkal. As it is a Government record and as the date of death is relevant the application is ordered. The said document is marked as Exhibit A-47.

11. In the result, the second appeal fails and is dismissed but with no order as to costs.

R.S. ---- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

Present:- *M.N.Chandurkar, C.J. and T.Sathiadev, J.*

*W.P.No.11433 of 1981. *7th January, 1985.*

V.Govindarajulu *Petitioner**

v.

The Government of Tamil Nadu represented by the Commissioner and Secretary to Government, Revenue Department, Madras-9 and another *Respondents.*

Fundamental Rules, Rule 56(d) - In force from 30-11-1972 - Government servant completing 25 years of service on 13-7-1972 - Compulsorily retired from service on 24-7-1976 - Retirement not valid since the rule came into force only on 30-11-72 long after completion of 25 years of service, by the Government servant.

A Government servant completed 25 years of service on 13-7-72. On 21-5-1976, the Review Committee made a recommendation that the Government servant should be compulsorily retired from service as he had completed 25 years of qualifying service.

Held:- Though Rule 56(d) of the Fundamental Rules as in force at the material time and which came into force on 30-11-72 enabled the State Government that if it was in public interest a Government servant should be compulsorily retired after he had attained the age of fifty years or after he had completed twenty five years of qualifying service, the rule having came into force on 30.11.72, the petitioner's case could not have been considered on the footing that he had completed 25 years of qualifying service because he had completed the said period of service long before the rule came into force. The only footing on which his case for compulsory retirement could have been considered, was under the

earlier part of Rule 56(d), which refers to attaining the age of 50 years. This the Review Committee has not done. Consequently the order of the State Government made on the basis of the Committee's recommendation is liable to be quashed. *[Paras.6 and 7]*

Case referred to:-

P.A.Manickam v. Government of Tamil Nadu, (1984) Writ.L.R.1.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the first respondent relating to his order dated 24-7-76 and made in G.O.Ms.No.1523 and quash the same.

M.Kalyanasundaram, for Petitioner.

N.R.Chandran, Additional Government Pleader, on behalf of Respondents.

The Order of the Court was made by

Chandurkar, C.J.:- The petitioner who had joined Government Service as a Lower Division Clerk on 14-7-1947 was in 1975 a Deputy Collector. His date of birth admittedly is 14-12-1925, so that be completed 50 years of age on 13-12-75 and 25 years of Government service on 13-7-1972.

2. The petitioner was served with an order of compulsory retirement under Rule .56(d) of the Fundamental Rules on 24-7-1976. The order merely says that under Fundamental Rule 56(d), the petitioner was retired from service from the date of issue of the order and a cheque representing three months' pay and allowances admissible on the date of retirement was enclosed.

3. This order was challenged by the petitioner under Article 226 of the Constitution of India. Among many of the grounds raised one ground is that the order in effect is penal in nature because some charges were framed against him on 25-3-1975. This writ petition is now before us because apparently the matter seems to be concluded by the Full Bench decision of this Court in *Manickam, P.A. v. Government of Tamil Nadu*, (1984) Writ.L.R. page 1.

4. The Case of the State Government in the return is that the petitioner's case was considered by the Review Committee originally on 18-9-1975 *i.e.* about three months prior to his completion of 50 years and the Review Committee then decided to reconsider the matter later, depending upon the course which the disciplinary proceedings would take. According to the State Government, the petitioner's case was reconsidered by the Review Committee again, and on 21-5-1976, the Review Committee recommended the petitioner's name for compulsory retirement. In the return, the State Government gave the nature of the charges against the petitioner which showed that according to the State Government, he had awarded unduly high compensation in respect of lands acquired under the Land Acquisition Act. The stand taken by the State Government was that, this was however, a pure and simple compulsory retirement made under Fundamental Rule 56(d), because it was not in public interest to continue the petitioner in employment.

5. When the matter was argued before us, we tried to ascertain from the learned Government Pleader as to why the Review Committee did not take any final decision in the matter of compulsory retirement of the petitioner when his case was considered first. The learned Government Pleader has fairly produced before us the recommendations of the Review Committee made on both the occasions. On the first occasion, the Review Committee took the view that in the case of the petitioner a further review would be necessary after the disciplinary proceedings initiated against him are finalised/or after six months. When the matter was considered by the Review Committee again, they made a recommendation on 21-5-1976 that the petitioner should be compulsorily

retired from service. But the recommendations of the Review Committee, however, show that the case of the petitioner was considered on the footing that 'he had completed 25 years of qualifying service on 31-8-1975 for continuance in service.'

6. According to Mr.Kalyanasundaram who appears for the petitioner, the petitioner's case is covered by the decision of the Full Bench in *Manickam's Case*, (1984) Writ.L.R. page 1 because the order of compulsory retirement of the petitioner which was made on 24-7-1976 is not based on any fresh material between 18-9-1975 which is the date on which the Review Committee considered the petitioner's case for the first time and 24-7-1976 when the order of compulsory retirement was made. It is not necessary for us to go into this question which is raised by the learned counsel for the petitioner, because on a perusal of the relevant records which have been fairly produced on behalf of the Government, it appears to us that the order of compulsoty retirement is vitiated by a complete want of application of the mind to the material legal position, which the Review Committee was bound to consider. Undoubtedly, Rule 56(d) as in force at the material time and which came into force on 30-11-1972 enabled the State Government that if it was in public interest, a Government servant could be compulsorily retired' after he has attained the age of fifty years or after he has completed twenty-five years of qualyfying service.' The rule having come into force on 30-11-1972, the petitioner's case could not have been considered on the footing that he had completed 25 years of qualifying service because he had completed the said period of service long before the rule come into force. Even otherwise, the recommendation shows that there was a mechanical consideration of the case of the petitioner, because Rule 56(d) does not contemplate anything like qualifying service with reference to the date 31-8-1975, which has been recited in the recommendation of the Review Committee, while referring to the fact that the petitioner had completed 25 years of qualifying service. This shows that the Review Committee had completely misread the provision in Rule 56(d). The petitioner having completed 25 years of qualifying service on 13-7-1972, the only footing on which his case for compulsoty retirement could have been considered, was the earlier part of Rule 56(d), which refers to attaining the age of 50 years. This the review Committee has not done. As a matter of fact, the recommendations even on the face of them do not show that the question as to whether the petitioner was entitled to be retained in service after attaining the age of fifty years was ever considered by the Second Review Committee.

7. The learned Government Pleader wanted to contend that even though the words '50 years of age' have been struck off in the recommendation, the recommendation of the Review Committee must be so read as to indicate that the question of retention of the petitioner in Government Service was considered on the basis of his age, not on the basis of his service in Government employment. This it is impermissible to do, because the recommendations have been signed by four members of the Committee, we must read the recommendations as they have been made to the State Government. On the short ground that the Review Committee has not applied its mind to the relevant requirement of Fundamental Rule 56(d), the recommendation of the Review Committee and consequently the order of the State Government made on the basis of that recommendation are liable to be quashed. Accordingly, we quash the order of compulsory retirement dated 24-7-1976. The petitioner will be entitled to be treated as being in employment from 25-7-1976 till the date of his normal superannuation under the relevant Fundamental Rule. The petitioner will consequently be entitled to all the incidental benefits as if that he was in employment till the date of his superannuation. The petitioner

will be entitled to the costs of this petition. Counsel's fee is computed at Rs.400/-.

R.S. ---- *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *P.R.Gokulakrishnan and Maheswaran, JJ.*

*O.S.A.No.175 of 1984 and Memorandum of Cross Objections. 14*th March*, 1985.

M.Thilakam and another *Appellants**

v.

M.R.Radhika and another *Respondents.*

and

M.R.Radhika *Appellant*

v.

Sha Javanmal Kapuraji and others *Respondents.*

(A) Hindu Minority and Guardianship Act (XXXII of 1956), section 11 - De facto guardian - Mother a de facto guardian while father is alive - Ban to alienate property of the minors extends to the mother and to all the properties of a minor without exception.

It is the father who is the natural guardian of his minor children and the mother will become the natural guardian only after the death of the father. While the father is alive he alone is the natural guardian of the children. The mother could be termed only as a *de facto* guardian if it is established that the minor children are living with the mother. Even there, the mother has no competence to deal with the immoveable properties of the minors. Section 11 of the Act abrogates the power of the *de facto* guardian to deal with any property of a minor, whether it is an undivided interest in joint family property or not. *[Para.14]*

(B) Transfer of Property Act (IV of 1882), section 53-A - Doctrine of part-performance - Available only to those who are put in possession by virtue of a legal document.

The permission of the Court to sell the minor's property is a condition precedent for executing a sale deed as per the sale agreement. Since it has to depend upon a permission, where such a permission has not been obtained, there is no question of specifically enforcing the sale agreement. Inasmuch as there is no valid agreement there is no question of the appellants being in possession of the suit property lawfully. If their possession is not lawful, the doctrine of part performance cannot be invoked. *[Para.15]*

(C) Hindu Minority and Guardianship Act (XXXII of 1956), section 8(1) - Contract for the benefit of a minor entered into by a guardian - Voidable at the instance of the minor - Minor avoiding contract - When avoidance becomes operating - Becomes void from the inception on such avoidance.

When a minor avoided a lease executed by his mother, the lease become void from the inception. *[Para.14]*

Cases referred to:-

Narasa Reddy v. Income-tax Officer, Nellore, (1960)2 An.W.R.20= 39 I.T.R. 629= A.I.R.1960 Andh. Pra.614; *Commr. of I.T., Ahmedabad v. B.J.Vaidya*,

A.I.R.1959 Bom.298; *Srikakulam Subrahmanyam v. Kurra Subba Rao*, L.R.75 I.A.115= (1948)2 M.L.J.22= I.L.R. (1949) Mad.141= 61 L.W.441= A.I.R.1948 P.C.95; *Minor Ramalingam Reddy v. Babanambal Ammal*, (1950)2 M.L.J.597= A.I.R.1951 Mad.431; *Vadakattu Suryaprakasam v. Ake Gangaraju*, (1955) An.W.R.818= A.I.R.1956 Andh.Pra.33; *Popat Mamdeo Sodanvor v. Jagu Pandu Govekar*, A.I.R.1969 Bom.140; *Linga Reddy v. Ramchandrappa*, A.I.R.1971 Mys.194; *E.Venkatakrishna Reddy v. Minor Amarababu*, (1971)2 M.L.J.466; *K.R.S.Chandhee Widya Vati Madden v. Dr.C.L. Katial*, (1964)2 S.C.J.824= (1964)2 S.C.R.495= A.I.R.1964= S.C.978; *Nathulal v. Phoolchand*, (1971)2 S.C.J.51= (1970)2 S.C.R.854= A.I.R.1970 S.C.546; *Manik Chand v. Ramachandra*, (1980)4 S.C.C.22= (1980)2 S.C.R.1104= A.I.R.1981 S.C.519; *Biswanath Charit v. Damodar Patra*, A.I.R.1982 Cal.199; *Ranganatha Gounder v. Kuppuswami Naidu*, (1976)2 M.L.J.128; *Angammal v. Balasubramanian*, (1980)1 M.L.J.242; *Darbara Singh v. Karminder Singh*, A.I.R.1979 P. & H.215; *G.Annamalai Pillai v. The Dist. Revenue Officer*, (1984) T.N.L.J.403; *Gobardhan Lal v. Sheo Narayan Sahu*, A.I.R.1929 Pat.202; *Narain v. Aukhoy*, I.L.R. (1886)12 Cal. 152.

Appeal under Clause 15 of the Letters Patent and under Order 36, rule 1 of O.S. Rules against the order of Mr.Justice S.A.Kader dated 14-3-1984 and made in C.S.No.44 of 1981.

The Judgment of the Court was delivered by

Gokulakrishnan, J.:- Defendants 2 and 3 are the appellants and the plaintiff is the Cross Objector. The suit is for a declaration that the plaint schedule mentioned house bearing Door No.28, Venkararaman Street, Srinivasa Avenue, Madras-28, belongs to the plaintiff absolutely and for directing defendants 2 and 3 to deliver vacant possession of the said house to the plaintiff. The plaintiff further prays for directing defendants 2 and 3 to pay to the plaintiff a sum of Rs.3,600/- being the arrears of rent from June, 1980 to December, 1980 and Rs.2,000/- per month thereafter for use and occupation till they deliver vacant possession to the plaintiff.

2. It is the case of the plaintiff that the second defendant is the wife of the third defendant and that defendants 2 and 3 are residing in the suit house on the strength of the lease deed entered into by the second defendant with the mother of the plaintiff. When the plaintiff was a minor, the suit property was purchased by means of a sale deed dated 6-4-1963. Defendants 2 and 3 were inducted as tenants in the suit property by the mother of the plaintiff. While the plaintiff was at the age of 14, the second defendant entered into an agreement of lease with one W.J.Fernando on 14-5-1976. The said lease agreement states that W.J.Fernando is representing the plaintiff as lessor. It is the further case of the plaintiff that in that lease agreement it has been falsely mentioned that the plaintiff is the wife of the said Fernando. In and by the lease agreement dated 14-5-1976, the ground floor portion of the building was leased out to the second defendant. Subsequently, the defendant entered into a lease deed with the mother of the plaintiff for eleven months under which the second defendant has taken on lease the entire premises on a monthly rent of Rs.600/-. The plaintiff averred in the plaint that she is not bound by the two agreements referred to above, that defendants 2 and 3 are not entitled to continue as tenants and that the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 do not apply to the premises in question. Surprisingly, the third defendant sent a letter dated 6-9-1980 to the plaintiff stating that defendants 2 and 3 would not pay any rent to the plaintiff since the first defendant had purchased the suit property. It is further averred in the plaint that the plaintiff is not a party to any of the transactions of the first defendant with reference to the house. The plaintiff questioned the purchaser. The purchase was also questioned by the second defendant by an application under Order 21, rule 58, Civil Procedure Code,

wherein the second defendant has alleged that the property belongs to the plaintiff and that her mother M.R.Geetha and her late father M.R.Radha have no interest in the suit property. It is stated in the plaint that the plaintiff is not bound by the decree obtained by the first defendant and the sale effected through execution proceedings in favour of the defendants will not bind the plaintiff in the suit. It is further averred in the plaint that the second defendant has entered into an agreement dated 15-5-1976 with the mother of the plaintiff for the purchase of the suit property and that such an agreement of sale will not in any way bind the plaintiff. On 11-12-1980, the plaintiff issued a notice to the defendants mentioning the abovesaid facts and calling upon the second defendant to deliver vacant possession of the suit premises. To this notice, the defendants have not sent any reply. According to the plaintiff, she was a spinster, that she never married Fernando, that the alleged agreement entered into by the second defendant with the said Fernando is not binding on her, that the mother of the plaintiff had no right to enter into an agreement of sale on 15-5-1976 as well as the lease agreement in December, 1976 and that the plaintiff is entitled to ignore these two agreements. The plaintiff has also averred in the plaint that the sale in favour of the first defendant is not at all binding upon her and as such, the declaration prayed for and the possession asked for must be granted by the court. With the abovesaid allegations, the plaintiff has come forward with the present suit.

3. Inasmuch as the dispute between the first defendant and the plaintiff has been settled as on date, it is unnecessary to refer to the written statement filed by the first defendant.

4. Defendants 2 and 3 have filed a common written statement *inter alia* contending that the third defendant is not a necessary party, that the plaintiff has to strictly prove her parentage and her date of birth, that M.R.Geetha the mother of the plaintiff, is not the legally wedded wife of M.R.Radha, that the plaintiff got married to her maternal uncle Navarthna Fernando on 12-9-1975 in Ceylon and that the same is clear from the deed of agreement for sale executed on 15-5-1976 in favour of the second defendant herein. It is further alleged by defendants 2 and 3 that in pursuance of the sale agreement executed on 15-5-1976 in favour of the second defendant herein, the second defendant was given possession of the suit property in the month of May, 1976 after the vendors had vacated the suit property, that such possession was handed over in pursuance of the agreement of sale, that the second defendant has made improvements to the value of Rs.12,000/- to the suit property, that while handing over possession of the entire suit property the plaintiff's husband Navarathna Fernando and her mother received a sum of Rs.8,200/-, that the second defendant has paid the property tax and water tax amounting to Rs.5,802-70 and that all these amounts have to be taken into consideration in favour of the second defendant. Defendants 2 and 3 categorically denied that the monthly rent is Rs.600/-. According to them, the second defendant was paying Rs.300/- per month as per the arrangement entered into for such payment till the completion of the sale and not Rs.600/-. It is reiterated by defendants 2 and 3 that the lease agreement dated 14-5-1976 was superseded by the agreement of sale dated 15-5-1976 and that no rents were paid by defendants 2 and 3 as if they were tenants. According to them, the agreement of sale dated 15-5-1976 is binding on the plaintiff and that she is bound to execute the sale deed in favour of the second defendant in respect of the suit property on obtaining the income-tax clearance certificate for the suit property. The second defendant is always ready and willing to pay the balance of consideration of Rs.72,000/- and that she is ready to purchase the suit property as she has already paid an advance of Rs.3,000/- out of the sale consideration of Rs.75,000/- and that

she is always ready to pay the balance of the sale consideration and to obtain the sale deed executed by the plaintiff in favour of the second defendant. The second defendant has also given the details for the payment of Rs.5,802-60 towards various tax dues payable by the plaintiff. Defendants 2 and 3, after alleging that the agreement of sale executed by the plaintiff's husband and her mother should be specifically enforced, contended that they are demanding the same as a counter-claim in the suit filed by the plaintiff. The counter claim was valued at Rs.75,000/- and a court fee of Rs. 3,800/- was paid for the same. In the counter claim mentioned in the written statement itself, the second defendant prayed for specific performance of the agreement of sale dated 15-5-1976 in respect of the suit property and wanted a direction to the plaintiff from the court to execute a deed of sale in favour of the second defendant in respect of the suit property and in default requested the Court itself to execute the sale deed in favour of the second defendant. For all these reasons, defendants 2 and 3 contended, that the plaintiff is not entitled to a decree for delivery of the vacant possession of the suit property nor the arrears of rent and mesne profits and that the suit has to be dismissed by decreeing the counter claim made by defendants 2 and 3.

5. On these pleadings, the learned single Judge of the Court framed the following issues:-

1. Whether the agreement for sale dated 15-5-1976 in favour of the second defendant is true, vaild and binding on the plaintiff?

2. Whether the second defendant has been ready and willing to perform her part of the contract?

3. Whether the second defendant is entitled to specific performance of the above agreement for sale?

4. Whether the plaintiff is entitled to vacant possession?

5. Whether the third defendant is a necessary party to this action?

6. To what relief are the parties entitled?

7. After elaborately discussing the evidence on record, the learned Judge found that the suit property belonged to the plaintiff absolutely, that defendants 2 and 3 should deliver vacant possession of the same to the plaintiff, that the second defendant has to pay a sum of Rs.3,600/- to the plaintiff towards the arrears of rent from July, 1980 to December, 1980 at Rs.600/- per month, that defendants 2 and 3 should pay damages for use and occupation at Rs.1,000/- per mensem from 1-1-1981 till delivery of possession and that the plaintiff has to pay defendants 2 and 3 a sum of Rs.20,802-80 as compensation as a condition precedent to taking delivery of possession. In the result, the learned Judge decreed the suit filed by the plaintiff but dismissed the counter of the second defendant for specific performance. Aggrieved by the judgment and decree of the learned Judge of this court, defendants 2 and 3 have preferred the above appeal while the plaintiff has preferred the cross objections questioning the finding of the learned Judge directing the plaintiff to pay defendants 2 and 3 a sum of Rs.20,802-80 as compensation as a condition precedent for taking delivery of possession.

8. Mr.A.Shanmughavel, learned counsel appearing for the appellants submitted that the sale agreement Exhibit D-21 is valid and binding on the plaintiff, that there was a demand for payment of income-tax arrears as exhibited by Exhibits D-4 to D-20 against the plaintiff and that the agreement to sell effected is for legal necessity and as such, binding upon the plaintiff. It is then submitted by Mr.A.Shanmughavel, that as part performance of Exhibit D-21, the appellants were put into possession of the suit property and that there is no time limit fixed

for enforcing Exhibit D-21 agreement. It is further contended by the learned counsel for the appellants that the appellants, who were put into possession of the suit property in pursuance of Exhibit D-21, had spent large amounts in improving the suit property, and in paying the water tax and property tax and other connected charges. Hence, it is submitted by Mr.A.Shanmughavel, that the appellants' possession has to be protected under section 53-A of the Transfer of Property Act. He then contended that even apart from the nature of possession, which entitles the appellants to purchase the property by virtue of Exhibit D-21, the possession of the appellants cannot be disturbed in a Civil Court since the rent payable is only Rs.300/- and not Rs.600/- as claimed. It is further submitted by Mr.A.Shanmughavel, that the agreement Exhibit D-21 is only voidable and not void, that the natural guardian of the plaintiff is her mother M.R.Geetha since the plaintiff is the illegitimate child of M.R.Radha, that Exhibit D-21 has been validly executed by M.R.Geetha representing the plaintiff and that the agreement was effected in order to discharge the income-tax arrears. As regards the counter-claim for specific performance of the agreement Exhibit D-21, Mr.A.Shanmughavel submitted that the same is within time since it has been filed within three years from the date of repudiation by the plaintiff under Exhibit P-5 notice. Finally, he submitted that the claim for damages decreed in favour of the plaintiff is without any evidence.

9. Mr.A.L.Somayaji, learned counsel for the plaintiff submitted that the suit property belongs to the plaintiff, that she has repudicated Exhibit D-21 agreement by issue of Exhibit P-5 notice, that the person who represented the plaintiff in Exhibit D-21, is not a natural guardian and that under section 11 of the Hindu Minority and Guardianship Act, the *de facto* guardian cannot dispose of or deal with the property. He further submitted that there is a clear finding by the learned Judge that there is no proof of marriage between Fernando and the plaintiff and that finding cannot be assailed in this appellate court. In any event, Mr.Somayajulu states that Exhibit D-21 the agreement is a void document since the plaintiff is not represented either by natural or legal guardian. In respect of the argument of Mr.A.Shanmughavel with regard to section 53-A of the Transfer of Property Act, Mr.Somayajulu submitted that there is no valid agreement to sell the suit property, that Exhibits D-2 to D-6 will spell out that the appellants continue in the suit property only as tenants and that Exhibit A-21 does not spell out that the appellants are put into possession of the suit property. Hence, according to Mr.Somayajulu, the appellants cannot invoke Section 53-A of the Transfer of Property Act. As regards the necessity to sell the suit property he submitted, that the assessment order issued under Exhibit D-14 relates only to M.R.Geetha in her individual capacity, that the suit property under Exhibit P-2 was purchased only for Rs.35,000/- and that the assessment is for Rs.75,000/-.

10. Mr.Somayajulu, learned counsel for the plaintiff contended that Fernando is an inter-meddler, that the marriage of the plaintiff with Fernando has not been proved and that Fernando cannot represent the plaintiff in view of section 11 of the Hindu Minority and Guardianship Act. According to the learned counsel, Exhibit D-21 is an inchoate and incomplete agreement, that it will not give the intending purchaser any right for specific performance, that it is a contingenet agreement and that the contingency being, the permission of the Court should be obtained for selling the minor's property. In any event, the learned counsel submits that the counter-claim is barred by limitation in view of Article 54 of the Limitation Act. In respect of the improvements made by the appellants, for which a decree has been granted, the learned counsel for the plaintiff contends, that the appellants are not entitled for such improvements made.

The learned counsel further submits that the rent for the suit property is Rs.600/- per month and as such, the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 would not apply to this case. In respect of the memorandum of cross-objections filed by the plaintiff, the learned counsel for the plaintiff submitted that the damages awarded at the rate of Rs.1,000/- per month by the learned Judge is palpably low and that the learned Judge ought to have fixed it at Rs.2,000/- per month. In the memorandum of cross-objections, the plaintiff questions the cost awarded for the additions made by the appellants.

11. On these contentions, the points that arise for determination in the appeal and the memorandum of cross-objections are:-

1. Whether the agreement Exhibit D-21 is binding upon the first respondent/plaintiff?

2. Whether the first appellant/second defendant is entitled to specifically enforce the agreement Exhibit D-21?

3. Whether the first appellant/second defendant is entitled to get the benefit under section 53-A of Transfer of Property Act?

4. Whether the suit property is attracted by the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act?

5. Is the counter-claim filed by the first appellant/second defendant for specific performance barred by limitation?

6. Whether the first respondent/plaintiff is entitled to enhanced compensation for use and occupation?

7. Whether the appellants/defendants 2 and 3 are entitled to enhanced compensation for improvements made and expenses incurred.

12. <u>Point Nos.1 to 3:-</u> Exhibit D-21 is the agreement of sale on the strength of which the counter-claim for specific performance has been made by the second defendant. Exhibit D-21 was executed by the plaintiff represented by her husband Navarthna Fernando as her guardian and M.R.Geetha, wife of M.R.Radha. This is in favour of the second defendant. Exhibit D-21 is dated 15-5-1976 and is in respect of the suit property. The suit property was purchased as early as 6-4-1963 from one S.Jayaraman and the same is in favour of the plaintiff describing her as Radhika aged about one year, daughter of M.R.Geetha Fernando. In that sale deed, Geetha Fernando has acted as the guardian of the plaintiff. The property was purchased for a sum of Rs,35,000/-. In Exhibit D-21 it has been specifically averred that the plaintiff married Navarathna Fernando on 12-9-1975 and from that date onwards, the said Navarathna Fernando has become the guardian of the plaintiff. The necessity for executing Exhibit D-21 was stated to be that the suit property was attached for payment of income-tax amounting to Rs.50,686-50. It is further stated in Exhibit D-21 that the first vendor therein is a minor and that the vendors will take steps to move the proper court and obtain sanction for the sale. It is then averred in Exhibit D-21 that out of the sale price, the purchaser will pay the income-tax dues so far as the property is concerned and other binding debts. Thus, it is clear from Exhibit D-21, that the plaintiff was represented by Navarathna Fernando, describing himself as the husband of the plaintiff and obtaining the sanction of the proper court for selling the minor's property was made as a condition precedent in Exhibit D-21. The necessity for selling the suit property is stated to be the attachment of the same for the income-tax arrears.

13. In Exhibit D-14, the assessment order relating to M.R.Geetha, the Income-tax authorities estimated her total income at Rs.75,000/-. The order states that in respect of the purchase of the house property bearing Door No.28 Venkatraman street, Srinivasa Avenue,

Madras-28, the income for purchasing the said house was taken to be that of M.R.Geetha and she was assessed for the assessment year 1964-65. This assessment order makes it very clear that the assessment is for the Income of M.R.Geetha and not that of the plaintiff. As per Exhibit D-10, the Income-tax authorities attached the suit property for the arrears of tax payable by M.R.Geetha. Even from Exhibit D-10 it is clear that the tax is due only by M.R.Geetha and not by the plaintiff. No doubt, the suit property was attached by the Income-tax Department. Mr.Shanmughavel, learned counsel for the appellants, strenuously contended that it is the plaintiff who has to pay the income-tax for which the attachment was effected and as such, there was necessity for Exhibit D-21 agreement. In the connection, he points to sections 161 and 166 of the Income-tax Act. Section 160 of the Income-tax Act defines as to who is the representative assessee. Section 161 of the Act states that in cases of assessment as a representative assessee, it shall be assessed in his own name. Section 166 of the Act deals with direct assessment and recovery upon a person on whose behalf or for whose benefit the income therein referred to is receivable. This section says that there is no bar for such direct assessment and recovery. Reading these three sections, it is clear that the income alleged must be referable to the income of the minor. In this light, we can consider the decisions cited by the learned counsel for the appellants.

14. In *Narasa Reddy v. Income-tax Officer, Nellore*, (1960)2 An.W.R.20= 39 I.T.R.629= A.I.R.1960 Andhra Pradesh 614, a Bench of Andhra Pradesh High Court had occasion to consider as to whether sections 40 and 16(3)(a)(ii) of the Income-tax Act can co-exist. In that decision, the Bench after holding that it can co-exist and there is no discrimination as such offending Article 14 of the Constitution, found that where the income is received by the guardian on behalf of the beneficiary, the guardian is made liable. This decision, in our view, has nothing to do with the case on hand.

15. In *Commissioner of Income-tax, Ahmedabad v. B.J. Vaidya*, A.I.R. 1959 Bombay 298, a Bench of the Bombay High Court held that section 41 of the Income-tax Act is mandatory in its language and that the basic idea underlying section 41 is that the liability of the trustees should be co-extensive with that of the beneficiaries and in no sense a wider or a larger liability. Even this decision, according to our view, has no application to the facts of the present case. The mere attachment of the proeprty belonging to the plaintiff without any relation to the tax liability of the plaintiff cannot, in our opinion, create a legal necessity for selling the plaintiff's property. If there is any wrong attachment for the tax due by M.R.Geetha, the mere facts that M.R.Geetha is the guardian of the plaintiff, cannot in any way, affect the right of the plaintiff in the suit property and an illegal attachment cannot take away the right of the plaintiff in the suit property. As we have seen from the assessment order narrated above, the liability is that of M.R.Geetha and she has been individually assessed for her income of Rs.75,000/-. The assessment order do not spell out that M.R.Geetha was assessed in respect of the income derived by the plaintiff. If that be so, it is futile to argue that there was legal necessity for selling the suit property.

16. To fortify the contention that for legal necessity a guardian can alienate the property of a minor, Mr.A.Shanmughavel, learned counsel for the appellants further submitted that the agreement to sell, *i.e.* Exhibit D-21, was in effect executed by M.R.Geetha, mother of the plaintiff, and as such, the document is only voidable and cannot be void. For all these propositions, the learned counsel cited the following decisions, *SRIKAKULAM SUBRAHMANYAM v. KURRA SUBBA RAO*, (1948)2 M.L.J.22= 75 I.A.115= I.L.R. (1949) Mad.141= 61 L.W.441= A.I.R. 1948

Privy Council 95; *MINOR RAMALINGAM REDDY v. BABANAMBAL AMMAL*, (1950)2 M.L.J.597= A.I.R.1951 Madras 431; *VADAKATTU SURYA-PRAKASAM v. AKE GANGARAJU*, (1955) An.W. R.818 A.I.R.1956 Andhra Pradesh 33, (Full Bench); *POPAT NAMDEO SODANVOR v. JAGU PANDU GOVEKAR*, A.I.R.1969 Bombay 140; *LINGA REDDY v. RAMACHANDERAPPA*, A.I.R.1971 Mysore 194; *E.VENKATAKRISHNA REDDY v. MINOR AMARABABU*, (1971)2 M.L. J.466; *MRS.CHANDNEE WIDHYA VATI MADDEN v. Dr. C.L.KATIAL*, (1964)2 S.C.J.824= (1964)2 S.C.R.495= A.I.R.1964 S.C.978; *NATHULAL v. PHOOLCHAND*, (1971)2 S.C.J. 51= (1970)2 S.C.R.854= A.I.R.1970 S.C.546; *MANIK CHAND v. RAMACHANDRA*, (1980)4 S.C.C.22= (1980)2 S.C.R.1104= A.I.R.1981 S.C.519 and *BISWANATH CHARIT v. DAMODAR PATRA*, A.I.R.1982 Calcutta 199. We do not think it is necessary to deal with all these decisions since the learned counsel for the appellants must as the first proposition prove that Exhibit D-21 was executed by M.R.Geetha as guardian of the plaintiff and that it is for legal necessity. In paragraphs supra we have stated that the attachment by the Income-tax Department cannot bind the property of the plaintiff inasmuch as the said attachment is in respect of the tax due from M.R.Geetha individually. Exhibit P-2 sale deed executed in favour of the plaintiff as early as on 6-4-1963 is for a sum of Rs.35,000/- but M.R.Geetha was assessed for a sum of Rs.75,000/- as her income. These facts clearly establish that the income in the hands of M.R.Geetha was sought to be assessed and not the income of the plaintiff. Exhibit D-21 clearly states that the plaintiff was represented by Navarathna Fernando as guardian. It is alleged that Navarathna Fernando is the husband of the plaintiff. The evidence on record clearly establishes that the plaintiff is a Hindu. Exhibit P-1 clearly establishes that the plaintiff was born on 21-8-1962. The sale deed Exhibit P-2 is dated 6-4-1963. Thus, at the time of the sale deed in favour of the plaintiff, she was one year old. The agreement to sell the suit property under Exhibit D-21 is dated 15-5-1976. On that date, the plaintiff was only 14 years old. In Exhibit D-21 Navarathna Fernando is described as the husband of the plaintiff, who was barely 14 years old on that date. Section 6 of the Hindu Minority and Guardianship Act, 1956, states that the natural guardian of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are:

a) in the case of a boy or an unmarried girl - the father and after him, the mother, provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

b) in the case of an illegitimate boy or an illegitimate unmarried girl - the mother, and after her, the father.

Section 11 of the very same Act reads as follows:

> "After the commencement of this act, no person shall be entitled to dispose of, or deal with, the property of a Hindu minor merely on the ground of his or her being the *de facto* guardian of the minor."

17. P.W.1 in her evidence has categorically denied the marriage between her and Navarathna Fernando. The appellants herein have failed to prove that the plaintiff married Navarathna Fernando. From the facts of the case it is clear that the appellants were content to rely upon the averments in Exhibit D-21 for the purpose of proving that the plaintiff married Navarathna Fernando. The learned Judge of this Court has also dealt with all these aspects of the case including that of Exhibits D-2 and D-3, wherein the plaintiff has described herself as Miss.Radhika and came to the conclusion that the plaintiff was not married to Bavarathna Fernando and hence, he cannot validly represent the plaintiff in Exhibit D-21. We are in complete agreement with the reasoning of the learned Judge. Further M.R.Geetha, the mother of the plaintiff in Exhibit D-21 clearly accepts Navarathna Fernando as the guardian of the

plaintiff. On the basis of the finding of the learned Judge with which we agree, we can safely come to the conclusion that Navarathna Fernando cannot deal with the suit property in view of the clear prohibition under section 11 of the Hindu Minority and Guardianship Act, 1956. The position is made clear in *RANGABATHA GOUNDER v. KUPPUSWAMI NAIDU*, (1976)2 M.L.J.128 wherein a learned Judge of this Court has held as follows:-

"The provisions of the Hindu Minority and Guardianship Act provide that it is the father who is the natural guardian of his minor children and the mother will become the natural guardian only after the death of the father. The Act also provides that the natural guardian alone has got the power to deal with the immovable properties of the minors, and that too, with the permission of the Court. The further effect of this Act is that it has taken away the power of the *de facto* guardian to deal with the property of a Hindu minor, which power was available to a *de facto* guardian under the prior Hindu Law in certain stated circumstances. While the father is alive he alone is the natural guardian of the children and the mother could be termed only as a *de facto* guardian if it is established that the minor children are living with the mother. Even then, under section 11 she has no competency to deal with the immovable properties of the minors, and therefore, the alienation effected by the mother in the instant case acting as the guardian of her minor children is totally void. Section 11 of the Act abrogates the power of the *de facto* guardian to deal with any property of a minor, whether it is an undivided interest in a joint family property or not. Unlike sections 6 and 9 which while referring to the 'minor's property' expressly states 'excluding his or her undivided interest in joint family property' and the words 'other than the undivided interest referred to in section 12' respectively section 11 does not exclude any such undivided interest of a minor in the joint family property from its scope and therefore the incompetency of a *de facto* guardian to deal with a minor's property extends to all the properties of a minor without any exception."

In yet another decision reported in *Angammal v. Balasubramanian*, (1980)1 M.L.J.242, this position was succinctly dealt with by Ratnam, J. who has held as follows:

"The alienation by a *de facto* guardian for legal necessity was held to be valid under the old Hindu Law. The position has been totally altered by the introduction of section 11 of the Hindu Minority and Guardianship Act. After 25th August, 1956, any alienation by a *de facto* guardian is void *ab initio* and such a guardian is incompetent to make the alienation bind the minor. The position of an alienee from such a *de facto* guardian has been held to be that of a trespasser."

Further section 8 of the Hindu Minority and Guardianship Act clearly prohibits dealing with immovable property of a minor without the prior permission of the Court. In *DARBARA SINGH v. KARMINDER SINGH*, A.I.R.1979 Punjab and Haryana 215, it was held as follows:-

"The provision in sub-section (1) of section 8 of the Act makes it expressly clear in unqualified terms that the personal covenant of the guardian shall not be binding on the minor. It means only this that, when looked from the standpoint that the aforesaid interdiction is added at the fag-end of section 8(1) by way of proviso to the clause that preceded it, a guardian though well within his right to enter into a contract for the benefit of the minor, but the said contract would not be enforceable against the minor even when it was entered for his benefit and would be voidable at his instance."

In *G.Annamalai Pillai v. The District Revenue Officer, South Arcot, Cuddalore,*

(1984) T.L.N.J.403 a Bench of this Court had occasion to consider as to when exactly the avoidance by the minor becomes operative. In that case, the Bench held that when the minor avoided the lease executed by his father, the fourth respondent, the lease becomes void from its inception and no statutory right could, therefore, accrue is favour of the appellant therein. So far as the present case is concerned, the plaintiff by her lawyer notice Exhibit P-5 dated 11-12-1980 has clearly stated that the agreement Exhibit D-21 is not binding on her. This is a clear repudiation and as such, the agreement Exhibit D-21, even assuming for the sake of argument that the same has been executed by a natural guardian, is void from its inception.

18. Mr.Somayajulu, learned counsel for the plaintiff further contended that Exhibit D-21 depends upon getting a permission from the Court for selling the minor's property. Hence, it is an inchoate and incomplete agreement and as such, it will not give a right to the appellant to specifically enforce the same. In this connection, the learned counsel relied on the decision reported in *Gobardhan Lal v. Sheo Narayan Sahu*, A.I.R.1929 Patna 202 wherein a Division Bench has usefully referred to the decision in *Narain v. Aukhoy*, (1886) I.L.R.12 Calcutta 152 wherein the Calcutta High Court has held as follows:-

> "A certificated guardian of certain minors entered into an agreement with the plaintiff to sell certain land belonging to them for a fixed price contingent upon the leave of the Court, which was necessary, being obtained to the transaction, and a portion of the purchase money was paid by the plaintiff. The Court sanctioned the sale but at a higher price than that agreed on between the plaintiff and the guardian, and the latter sold to the third party. The plaintiff, thereupon sued the minors by their guardian as next friend and the third party for specific performance of the agreement to sell to him at the price mentioned in the agreement.
>
> *Held:* that the contract was not one which could be specifically enforced, and that section 26, Specific Relief Act, did not apply. The contract as it stood was never a complete contract at any time, as it was contingent upon the permission of the Court, and the permission of the Court did not extend to the whole contract as agreed upon between the parties."

Applying the above said principle to the case on hand, it is clear that the permission of the Court to sell the minor's property is a condition precedent for executing the sale deed as per the sale agreement Exhibit D-21. Since it has to depend upon a permission and since such a permission has not been obtained, there is no question of specifically enforcing the sale agreement Exhibit D-21. In the above said background, we are afraid, we cannot appreciate the argument of Mr.A.Shanmughavel, learned counsel for the appellants, putting forth section 53-A of the Transfer of Property Act. Inasmuch as there is no valid agreement as found by us in paragraphs supra, there is no question of the appellants being in possession of the suit property lawfully. If their possession is not lawful, the doctrine of part performance cannot be invoked. Section 53-A of the Transfer of Property Act reads as follows:-

> "Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,
>
> and the transferee has, in part-performance of the contract, taken possession of the property or any part thereof or the transferee, being already in possession, continues in possession in part-performance of the contract and has done some act in furtherance of the contract,
>
> and the transferee has performed or is willing to perform his part of the contract,

then notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer had not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract;

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part-performance thereof."

The benefit of section 53-A of the Transfer of Property Act can be availed of only by those who were put into possession by virtue of a legal document. Inasmuch as Exhibit D-21 is *ab initio* void even from its inception as found by us in paragraphs supra, the doctrine of part performance cannot be availed of by the appellants herein. Further, Exhibits D-4 to D-6, receipts given by M.R.Geetha to the second defendant, amply establish that the possession of the suit property by the second defendant is not in the capacity of the owner thereof but only as a tenant. Hence, we find points 1 to 3 against the appellants.

15. Point No.4 The suit filed by the plaintiff is for declaring the suit property as her absolute property and for directing the appellants to deliver vacant possession of the same. There is a prayer in the suit for directing the appellants to pay a sum of Rs.3,600/- being the arrears of rent from June, 1980 to December, 1980 and Rs.2,000/- per month for use and occupation till the appellants deliver vacant possession of the suit property to the plaintiff. There is a specific averment in the plaint to the effect that the appellants entered into the deed of lease for eleven months with the mother of the plaintiff undertaking to pay a monthly rent of Rs.600/- and that the plaintiff is not bound by that agreement. In the written statement filed by the appellants, they have stated that the rent for the building is only Rs.300/- and not Rs.600/- as alleged by the plaintiff. It has also been stated in the written statement that the second defendant was paying Rs.300/- per month as per the arrangement entered into for such payment till the completion of the sale. This averment clearly makes out that the second defendant was paying rent even subsequent to Exhibit D-21. Exhibit P-5 is the notice issued by the plaintiff to the defendants. In this notice it is stated that as per the lease deed, the monthly rent is Rs.600/-. The appellants sent a reply in Exhibit D-1 wherein they have specifically averred that the agreement of sale Exhibit D-21 is binding upon the plaintiff, that in pursuance of the said agreement, the appellants were given possession of the suit property and that the suit premises was handed over to the appellants not as tenats pure and simple but in pursuance of the agreement of sale dated 15-5-1976. Exhibit D-1 further states that since the plaintiff wanted to have income from the property, it was arranged that Rs.300/- should be adjusted towards the sum of Rs.8,200/- received from the appellants by Navarathna Fernando and M.R.Geetha every month and another sum of Rs.300/- to be paid every month till the sale transaction is completed. Thus, Exhibit D-1, spells out that the appellants have been put into possession by virtue of the agreement Exhibit D-21, that they were not tenants as such, and that, as an arrangement, a sum of Rs.600/- has to be paid to the plaintiff till the sale transaction is completed. In view of these averments in Exhibit D-1 it is too much for the appellants to say that the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 alone will apply to the facts of the case. If they say that they are not the tenants, the remedy for the plaintiff to get possession is only by way of a civil suit. If

the appellants say that they are paying Rs.600/- per month only as an arrangement and if that is to be construed as rent, definitely, the building will be outside the purview of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. In the light of these facts, we are not able to appreciate the argument of the learned counsel for the appellants when he states that the rent is only Rs.300/- per month, that the appellants should be construed as tenants paying only Rs.300/- per month, that the Civil Court has no jurisdiction to entertain the suit and that the authorities constituted under the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 can have jurisdiction. Further, under Exhibit D-29, the mother of the plaintiff issued a notice dated 13-12-1977 to the appellants calling upon them to vacate the premises. In that notice, it has been specifically averred that the second defendant entered into an agreement of tenancy for a fixed period of eleven months on a monthly rent of Rs.600/- and that the agreement expired on 30-11-1977 by efflux of time. To this notice, the appellants through their counsel issued a reply under Exhibit D-30, specifically alleging that an agreement of sale had been entered into, that since the sale will be delayed owing to the fact that there will be delay in obtaining court permission, in order to give income from the suit property, an arrangement was made, that in and by the arrangement, a futher sum of Rs.300/- has to be paid towards sale consideration apart from the sum of Rs.8,200/- already paid and that another sum of Rs.300/- has to be paid every month till the sale consideration is completed. Thus, even from Exhibits D-29 to D-30, it has been amply established that the appellants were paying at the rate of Rs.600/- per month even as early as from the date of the agreement Exhibit D-21. These established facts cannot in any way be affected by Exhibits D-4 to D-6 since the payment of the additioal sum of Rs.300/- apart from the sum of Rs.300/-, mentioned in these documents can only be construed as rent. Mr.Somayajulu, learned counsel for the plaintiff also points to the evidence of D.W.1, who is the third defendant, and states that inasmuch as D.W.1 has stated that he is willing to pay a sum of Rs.75,000/- in spite of the fact that he has deposed that more than Rs.24,100/- has been paid already, shows that a sum of Rs.300/- were paid towards rent and that the case of the plaintiff that the rent for the building is Rs.600/- per month is fortified. Even in the written statement, the appellants have offered to pay a sum of Rs.75,000/- less Rs.3,000/- advance already paid. All these aspects have been considered by the learned single Judge of this Court and a finding has been given to the effect that the monthly rent agreed upon is Rs.600/- and hence, the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act have no application to this residential building. From the evidence on record, which we have discussed in paragraphs supra, we are in complete agreement with the reasoning and finding of the learned single Judge of this Court on this aspect of the case.

17. Point No.5:- The learned single Judge of this court has, no doubt, held that the counter-claim filed on 19-2-1982 by the appellants for specific performance of the agreement is hopelessly barred by limitation. This finding is arrived at on the basis that in Exhibit D-29 notice there is a clear repudiation of the agreement for sale. Mr.A.Shanmughavel, learned counsel for the appellants, contended that only in Exhibit P-5, the plaintiff has repudiated the agreement Exhibit D-21. Exhibit P-5 is dated 11-12-1980. The counter claim was filed on 19-2-1982. Hence, according to the learned counsel for the appellants, the counter claim is well within threee years as provided in Article 54 of the Limitation Act. Article 54 of the Limitation Act states that for specific performance of an agreement, the period of limitation is three years from the date fixed for the performance or if no such date is fixed, when the plaintiff has notice that the performance is refused. No

doubt, the learned counsel for the plaintiff, basing on Exhibit D-29, which is dated 13-12-1977, contended that the counter-claim filed on 19-2-1982 is beyond the period of three years and as such, it is barred by limitation under Article 54 of the Limitation Act. We have carefully gone through Exhibits D-21, D-29, D-30 and P-5, which are the relevant documents to decide the question of limitation. In Exhibit D-21, which is the agreement to sell, it is stated, that the sale has to be effected within a month of the receipt of the sanction order from Court and communication of the same to the appellants herein. It is an admitted fact, that no such sanction has been obtained from Court uptill today. Exhibit D-29 is the notice issued by M.R.Geetha to the appellants. It is dated 13-12-1977. Exhibit D-29 is a simple notice for eviction on the ground that the lease agreement has come to an end. There is absolutely no reference to the sale agreement Exhibit D-21 in Exhibit D-29 nor repudiation of the same. To construe Exhibit D-29 and Exhibit D-30, which is the reply for Exhibit D-29, as the repudiation of the sale agreement Exhibit D-21 is against the facts of the case. In Exhibit P-5, which is dated 11-12-1980, the plaintiff in unequivocal terms, has repudiated the agreement dated 15-5-1976. The counter-claim filed is on 19-2-1982. As per Article 54 of the Limitation Act, this counter-claim is well within a period of three years from Exhibit P-5 wherein the agreement of sale Exhibit D-21 was for the first time repudicated. Hence, the finding of the learned Judge to the effect that the counter claim is barred by limitation cannot be sustained. Accordingly, we hold, that the counter claim is within the period of limitation.

19. Point No.6:- In the memorandum of cross-objections filed by the plaintiff, she has claimed damages at the rate of Rs.2,000/- per month with effect from 1-1-1981 and has also questioned the legality of granting a sum of Rs.17,802/- by way of improvements to the appellants by the learned single Judge. The appellants in their grounds of appeal questioned the finding of the learned single Judge fixing the damages at Rs.1,000/- per month when there is absolutely no evidence to fix the damages at Rs.1,000/-. It was further contended by the appellants that the order of Shanmukham, J. in Application No.253 of 1981 fixing the damages for use and occupation at the rate of Rs.1,000/- per month is only tentative subject to the final assessment of such damages in the main suit. The appellants have further claimed that the learned Judge ought to have given compensation over and above Rs.20,802-80.

20. Shanmukham, J. in Application No.253 of 1981, considering the fact that the rent was fixed as early as 1976 at Rs.300/- per month and also the area occupied by the appellants viz., 2,700 sq. feet, thought it fit that a sum of Rs.1,000/- as damages may be tentatively fixed and accordingly fixed the same. As regards the final fixation of damages, the learned Judge has left it to be decided by the learned Judge who disposes of the suit finally. The learned Judge who disposed of the suit, after taking into consideration that the rent for the premises is Rs.600/- per month and also referring to the fact that the appellants apart from their occupation were receiving a sum of Rs.210/- by sub-leasing the other portion, fixed the damages at the rate of Rs.1,000/- per month. The claim of Rs.2,000/- per month as damages by the plaintiff has not been made out by cogent and acceptable evidence. Shanmukham, J. who disposed of Application No.253 of 1981, has discussed in detail before tentatively fixing the sum of Rs.1,000/- as damages per month. We completely agree with the reasoning and finding of Shanmukham, J. on this aspect of the case also that of Kader, J. who disposed of the suit finally and fix the damages at Rs.1,000/- per month.

21. Point No.7:- As regards the compensation claimed by the appellants, we are not able to differ from the finding and award made by the learned single

Judge of this Court. It is for the appellants to plead and establish the compensation claimed by them. As far as we could see, there is no evidence substantiating the payment of Rs.8,200/- towards sale consideration. Further, as we have discussed in paragraphs a sum of Rs.300/- towards rent was being adjusted out of the sum of Rs.8,000/- said to have been paid by the appellants. Apart from this evidence, Exhibits D-22 series, D-36, D-37 and D-49 series establish the spending of a sum of Rs.16,197-70 towards improvements to the building in question. Exhibit D-48 series establish the payment of water tax, etc., to the tune of Rs.1,605-10. Further, under Exhibit D-21 agreement the second defendant has paid a sum of Rs.3,000/- as advance. Calculating these proved amounts towards improvements, etc., the compensation that has to be paid comes to Rs. 20,802-80. This is the amount awarded by the learned single Judge of this Court. We are in complete agreement with the reasoning and finding of the learned Judge of this Court on this aspect of the case also and hold that the award of Rs.20,802-80 as compensation is correct.

22. For the fore-going reasons, we are of the view that the appeal and the memorandum of cross-objections should fail and accordingly, they are dismissed. However, we direct the parties to bear their own costs in both the appeal and the memorandum of cross-objections.

The order of the Court was made by

23. *Gokulakrishnan, J.*:- This matter is posted on the request made by Mr.A.Shanmughavel, learned counsel for the appellants. On behalf of the appellants, Mr.Shanmughavel prays for four months time to vacate the portion in the possession of the appellants. Taking into consideration the facts of this case, the appellants are granted four months time from today to vacate and deliver vacant possession of this portion in their occupation.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *S.Swamikkannu, J.*

*C.R.P.No.4067 of 1983. *17th April,* 1984.

C.Dhandayutham *Petitioner**

v.

M.Natarajan and others *Respondents.*

Civil Procedure Code (V of 1908), Order 23, Rule 1-A (after Amending Act 104 of 1976) - Transposing right available only to a defendant seeking to transpose himself as plaintiff.

A careful reading of the provisions contained in Order 23, Rule 1-A of the Civil Procedure Code shows that it is only the defendant who can transpose himself as plaintiff. But in the instant case, the revision petitioner prays for a plaintiff's transposition as defendant in the suit, which cannot be done. *[Para.1]*

Order 23, Rule 1-A of the Civil Procedure Code now specifically provides that if a defendant applies to be transposed to the category of plaintiff, the consideration whether the applicant has a substantial question to be decided against the other defendants should be weighed in deciding the application for abandonment of suit or withdrawal under Order 23, Rule 1-A of the Civil Procedure Code. The above provision does not enable the revision petitioner (second plaintiff) to transpose himself as defendant. *[Para.2]*

K.Srinivasan, for R.Vedantham, for Petitioner.

S.Selvaratnam, for Respondent.

The Court made the following

ORDER:- The second plaintiff in O.S.No. 239 of 1981 on the file of the learned District Munsif, Palani, is the petitioner herein. I.A.No.1054 of 1983 in O.S.No.239 of 1981 was filed under Order

23, Rule 1-A and section 151 of the Civil Procedure Code, by the second plaintiff for transposing him as a defendant in the suit. Order 23, Rule 1-A Civil Procedure Code which was inserted by the Amending Act 104 of 1976 reads as follows:-

> "Where a suit is withdrawn or abandoned by a plaintiff under Rule 1 and a defendant applies to be transposed as a plaintiff under Rule 10 of Order 1 the Court shall, in considering such application, have due regard to the question whether the application has a substantial question to be decided as against any of the other defendants."

A careful reading of the above provision shows that it is only the defendant who can transpose himself as plaintiff. But in the instant case, the revision petitioner prays for his transposition as defendant in the suit. In the affidavit filed in support of I.A.No. 1054 of 1983 the second defendant has stated that O.S.No.239 of 1981 had been filed originally by him and the first plaintiff, against the first defendant who is a tenant under them, for recovery of possession of the property and arrears of rent. He has further stated that the first plaintiff is colluding with the first defendant and is not co-operating with him to conduct the case and hence it is unsafe for him to prosecute the suit along with the first plaintiff. Hence he has come forward with this I.A.No.1054 of 1983 to transpose himself as a defendant in the suit. But we have already seen that under the provisions of Order 23, rule 1-A this petition cannot be entertained because it is only the defendant who can seek transposition as plaintiff and the plaintiff cannot seek transposition as defendant. Therefore, it is clear that under the provisions of Order 23, rule 1-A the case of the revision petitioner cannot be upheld.

2. Order 23, Rule 1-A of the Civil Procedure Code now specifically provides that if a defendant applies to be transposed to the category of the plaintiff, the consideration whether the applicant has a substantial question to be decided against the other defendants, should be weighed in deciding the application for abandonment of suit or withdrawal under Order 23, Rule 1-A of the Civil Procedure Code. Thus the above provision does not enable the petitioner to transpose himself as a defendant. It is also relevant to note that the first defendant has pointed out that he has not abandoned any suit and he is prepared to conduct the suit. Under the circumstances, the Court below is correct in holding that the plaintiff cannot seek the relief of transposing himself as a defendant in the suit and that the provision under Order 23, Rule 1-A Civil Procedure Code, is not applicable to the present case. In other words, the lower Court had rightly held that I.A.No.1054 of 1983 is not maintainable. There is no infirmity in the order under revision. The revision petition is dismissed under the circumstances without costs.

R.S. ----- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *G.Maheswaran, J.*

*C.R.P.No.433 of 1985. 26*th February,* 1985.

Chinnasamy Naidu *Petitioner**

v.

Amsaveni Ammal and others *Respondents.*

Civil Procedure Code (V of 1908), Order 1, rule 10 - Joint family - Suit for partition amongst members - Third party applying to implead himself as party claiming relief in respect of some items of properties - Application allowed.

In a suit for partition of joint family properties, if a stranger claims some of the items in dispute in his own absolute right he can be added as a party, for the court has to come to a decision whether those properties would be available or not for partition and for that purpose the stranger would have to be before the Court. *[Para.2]*

Case referred to:-

Paramasivam v. Adilakshmi Ammal, (1952)1 M.L.J.473= 65 L.W.781= A.I.R.1953 Mad.618.

N.V.Venkataseshan, for Petitioner.

G.Subramanian, for Respondents.

The Court made the following

ORDER:- This civil revision petition is directed against the order of the learned Subordinate Judge, Dindigul, in I.A.No.595 of 1984 refusing to implied the revision petitioner who is a third party, as party in O.S.No.153 of 1984, which is a suit for partition filed by respondents 1 and 2 against the third respondent. The third party-revision petitioner is none other than the husband of the third respondent. He claimed independent right in some of the items included in the suit. But, the learned Subordinate Judge dismissed the application on the ground that if he has got any right in the properties, he can file a separate suit.

2. In my view, there is no need to refer the petitioner to a separate suit. In a suit for partition of joint family properties, if a stranger claims some of the items in dispute in his own absolute right he can be added as a party, for, the court has to come to a decision whether those properties would be available or not for partition and for that purpose the stranger would have to be before Court. If authority is needed for that proposition, it has to be found in *PARAMASIVAM v. ADILAKSHMI AMMAL,* (1952)1 M.L.J.473: 65 L.W.781= A.I.R.1953 Mad.618. The revision is allowed. The court below will implead the revision petitioner as a party and proceed with the suit as expeditiously as possible. No costs.

R.S. ---- *Civil Revision Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *G.Maheswaran, J.*

*C.R.P.No.4294 of 1984. 28*th February,* 1984.

T.Muthu Kone *Petitioner**

v.

S.S.Ramachandran *Respondent.*

Civil Procedure Code (V of 1908), Order 20, Rule 11 - Executing Court - Powers - Permission to judgment-debtor to pay the decree amount in instalments - Available only to the Court that passed the decree - Not to the Executing Court.

A reading of Order 20, rules 11(1) and (2) Civil Procedure Code would show that the court has power to order payment of the decree amount in instalments when the decree is passed and that it can also pass such an order after the decree on the application of the judgment-debtor but with the consent of the decree-holder. In other words, it appears that the only court that has got powers to pass an order granting payment of the decree amount in instalments in the court which passes the decree and not the Executing Court. But the executing Court can pass such an order only with the consent of the decree-holder. *[Para.2]*

S.Kadarkarai, for Petitioner.

S.Subbiah, for Respondent.

The Court made the following

ORDER:- This revision is directed against the order of the learned District Munsif, Madurai Taluk, allowing the application of the respondent for paying the decree amount in instalments of Rs.100 per month. The decree amount is shown as Rs.6,335.50. The only contention raised by the learned counsel for the revision petitioner is that the Court has no jurisdiction to order payment of the decree amount in instalments when the decree-holder has not consented to such an order. It is seen from the counter-affidavit filed by the plaintiff before the executing Court that the judgment-debtor is having enough means to pay the decree amount in a lumpsum and that the property of the judgment-debtor has been attached before judgment and execution proceedings are pending. The learned District Munsif however passed an order allowing the application of the judgment-debtor to pay the amount in instalments.

2. A reading of Order 20, rules 11(1) and (2), Civil Procedure Code would show that the Court has power to order payment of the amount decreed in instalments when the decree is passed and that it can also pass such an order after the decree on the application of the judgment-debtor, but with the consent of the decree-holder. In other words, it appears that the only Court that has got powers to pass an order granting payment of the decree amount in instalments is the court which passes the decree and not the executing Court. But the executing Court can pass such order only with the consent of the decree-holder. In this case, admittedly consent was not given. The order of the learned District Munsif is therefore vitiated by material irrgularity and illegality and has to be set aside and is hereby set aside. The revision is allowed. No costs.

R.S. ---- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *G.Maheswaran, J.*

*C.M.S.A.No.76 of 1984. 11th February, 1985.

S.Thanikodi *Appellant*

v.

Ramuthayee *Respondent.*

Hindu Marriage Act (XXV of 1955), section 23(2) - Scope and Applicability - Petition for restitution of conjugal rights by husband - Suit for maintenance by wife against the husband filed earlier - Dismissal of the petition filed by the husband on the ground that it is a counter-blast to the suit for maintenance - Order of dismissal held to be correct - Court's failure to make attempt under section 23 - Effect.

It is no doubt true that section 23(2) of the Hindu Marriage Act casts a duty on the Court in the first instance, in a matrimonial cause, to bring about a reconciliation between the parties. But, it is only when the courts find that there may be some chance of saving the marriage that the Court would try to make a raproachment and not otherwise. The courts below have not attempted any reconciliation obviously as they did not find a chance of the parties coming together. The failure to make such an attempt will no doubt attempt to an omission, but it will not take away the jurisdiction of the Court to pass a decree for restitution or to dismiss a claim for restitution.

[Para.2]

K.J.Chandran, for Appellant.

The Court delivered the following

JUDGMENT:- This Civil miscellaneous second appeal is directed against the order of the learned First Additional Subordinate Judge, Madurai, dismissing the petition by the husband for restitution of conjugal rights. The husband appellant filed a petition against the wife, the respondent, seeking restitution of conjugal rights. The Courts below have clearly found that the wife has filed a suit for maintenance, and that this application for restitution is filed as a counter-blast to that suit of maintenance.

2. The only ground the counsel for the appellant takes is that the Courts below erred in not attempting a reconciliation between the parties. It is no doubt true that section 23(2) of the Hindu Marriage Act casts a duty on the Court in the first instance, in a matrimonial cause, to bring about a reconciliation between the parties. But, it is only when the courts find that there may be some chance of saving the marriage that the court would try to make a reapproachment and not otherwise. The Courts below have not attempted reconciliation obviously because they did not find any chance of the parties coming together. The failure of make such an attempt will no doubt amount to an omission, but it will not take away the jurisdiction of the court to pass a decree for restitution or to dismiss a claim for restitution. No substantial question of law arises in this case. The civil miscellaneous second appeal is dismissed *in limine*.

R.S. ------ *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

Present:- *S.Natarajan, J.*

*W.P.No.8982 of 1984. 12*th September,* 1984.

V.Muthuvel Mudaliar *Petitioner**

v.

P.Punyakoti Naidu and others *Respondents.*

(A) Tamil Nadu Debt Relief Act (XL of 1979), section 3(3)(iii) Proviso - Not ultra vires the Constitution and void.

(B) Constitution of India (1950), Article 14 - Tamil Nadu Debt Relief Act (XL of 1979), section 3(3) Proviso - Whether discriminatory.

Held:- The proviso to section 3(3) of Tamil Nadu Act 40 of 1979 lists out various categories of persons, who in the opinion of the legislature would not be entitled to claim the status

of a debtor and seek relief under the Act. It is wrong to find a common bond between these five categories of persons and then raise an argument that the Act has made a discrimination with reference to persons who can claim relief under clauses (iii) and (iv) of the Act. *[Para.4]*

G.Gopalan, for Petitioner.

The Court made the following

ORDER:- Failing in his attempt to get himself declared as a debtor entitled to protection under the Tamil Nadu Debt Relief Act 40 of 1979, before the Civil Court, the petitioner now seeks to invoke the extra-ordinary jurisdiction of this Court under Article 226 of the Constitution to seek the issue of a writ of declaration declaring section 3 (3)(iii) of the Tamil Nadu Debt Relief Act 40 of 1979 to be *ultra vires* the Constitution and void and to strike it down an unconstitutional.

2. The petitioner is the owner of a house property bearing door No.40, Kumaraswami Mudali Street, Perambur, Madras 11. The petitioner created a simple mortgage over a portion of the property in favour of the first respondent for a sum of Rs.6,000 under a registered mortgage deed of the year 1966. Subsequently, he created another mortgage over the said property in the year 1967 in favour of the second respondent, who is none other than the son of the first respondent, for a sum of Rs.6,500. Respondents 1 and 2 filed suits to enforce the mortgages and have obtained preliminary and final decrees. Besides taking up a defence that the mortgages were not fully supported by consideration, the petitioner also raised a plea that he is entitled to claim protection under the Tamil Nadu Debt Relief Act 40 of 1979. He raised such a plea on the ground that his annual rental income was below Rs.2,400. The trial Judge rejected the claim on the ground that since the petitioner is owning a house property which is being assessed to house tax on the basis of the annual rental value of not less than Rs.1,200, the petitioner is not entitled to claim protection under the Act. The petitioner challenged the order of the trial Judge before the Appellate Judge by filing a civil miscellaneous appeal; but the Appellate Judge too dismissed the appeal, rejecting the petitioner's contention. Having failed before the Civil Courts, the petitioner wants to attack the constitutional validity of Section 3(3)(iii) of the Act as unconstitutional.

3. For the purposes of this petition, it is necessary to refer to the sub-section (3) of the Act. The sub-section defines a 'debtor' as a person from whom any debt is due. Then the proviso sets out various categories of persons, who cannot be deemed to be debtors within the meaning of the Tamil Nadu Debt Relief Act, 40 of 1979 hereinafter referred to as the Act. The proviso sets out five categories of persons in Clauses (i)(a), (i)(b), (ii), (iii) and (iv). Clause (i)(a) refers to persons assessed to income tax under the Income Tax Act, 1961, or any analogous law in force in any other country and clause (1)(b) refers to persons assessed to agricultural income tax under the Tamil Nadu Agricultural Income Tax Act, 1955 or any analogous law in force in any State or Union territories in India, during both the financial years, ending on 31st March, 1977 and 31st March, 1978. Clause (ii) refers to persons, who have been assessed to sales tax under the Tamil Nadu General Sales Tax Act, 1959 or the Central Sales Tax Act, 1956, in both the financial years ending 31st March, 1977 and 31st March 1978. Clause (iii) refers to persons assessed to property or house tax in respect of the buildings or lands other than agricultural lands under the District Municipalities Act or the City Municipal Corporation Act or the Panchayat Act or the Cantonment Act, or any analogous law in all the four half years immediately preceding 1st March, 1978, provided that the aggregate annual rental value of such buildings and lands, whether let out or in the occupation of the owner, is not less than Rs.1,200. The Explanation to Clause

(iii) sets out the manner of calculation of the annual rental value but, for the purpose of this petition, those details are not necessary. Then comes Clause (iv), which refers to persons assessed to profession tax in all the four half years immediately preceding the 1st March, 1978 on a half yearly income of more than Rs.1,200, derived from a profession other than agriculture.

4. The contention of the petitioner is that under Clause (iv) of the sub-section, the upper limit of Rs.1,200 per half year of Rs.2,400 per annum has been fixed for persons paying profession tax to be denied the protection under the Act; but under Clause (iii), the upper limits for persons paying property tax to claim the benefit of the Act has been fixed at Rs.1,200 per annum. Therefore, there is a discrimination between persons paying profession tax and persons paying property tax, to claim the protection under the Act.

5. The contention of the petitioner is based on a misconception. The proviso lists out various categories of persons, who in the opinion of the Legislature, would not be entitled to claim the status of a debtor and seek relief under the Act. It is on account of that, clause (i) refers to assessees under the Sales Tax Act; Clause (iii) refers to assessees of house tax or property tax; and Clause (iv) refers to persons assessed to profession tax. Each category of person has to be treated separately. While the Income Tax assessee will be liable to pay income tax only if his income is more than Rs.15,000 per annum, a person will be liable to pay profession tax when his income exceeds Rs.200 per month or Rs.2,400 per annum. As regards Sales Tax assessees, their income is not taken into consideration, but their turnover, is taken into consideration. The owner of a house is liable to pay house tax on the annaul rental value or on an estimated 5 per cent return on the capital value of the building. It is, therefore, wrong to find a common bond between these five categories of persons and then raise an argument that the Act has made a discrimination with reference to persons who can claim relief under Clauses (iii) and (iv) of the Act. The question of discrimination will arise only when persons of the same category, are treated in a different manner. When they belong to different categories it is futile to contend that they stand on the same footing and therefore, parity of treatment should be given. The contention of the petitioner is therefore clearly misconceived. Consequently, the issue of rule is not called for and the petition will stand dismissed.

R.S. ----- *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *V.Ramaswami and Shanmukham, JJ.*

*O.S.A.No.85 to 88 of 1983 *24th October, 1984.*

Vinay Engineering Sole Proprietors, Priya Engineering Company Ltd., having registered office at B.6/4, Community Centre, Safdarjung Enclave, New Delhi
*Appellant**

v.

Neyveli Lignite Corporation Ltd, Neyveli, 607801, S.A.District and another
Respondnets.

(A) Contract Act (IX of 1872), section 122 - Banker and Customer - Bank guarantee - Enforcement of - Power of court to grant injunction.

(B) Civil Procedure Code (V of 1908), Order 39, rule 1 - Injunction restraining enforcement of bank guarantee - Power of Court - Court's power cannot be fettered.

Held:- The following principles are well settled. If the bank guarantees are (sic) unconditional, the bank has no defence when its guarantee is sought to be enforced. It is the document of guarantee that has to be scanned to ascertain whether the guarantee is conditional or otherwise and whether it is an autonomous contract by itself. Ordinarily, the Court shall not grant an injunction restraining enforcement of a bank guarantee save where the special equity was in favour of the beneficiary under the bank guarantee, in the instant case the appellant. In other words, there is no absolute fetter on the Court to grant injunction.
[Para.7]

Cases referred to:-

M.S.E.S.Bombay v. Official Liquidator, H.C.Ernakulam, A.I.R.1982 S.C.1497= (1982)3 S.C.C.358; *M/s. B.L.R. Mohan v. B.S.Co-op. S.A.M.Federation Ltd.,* A.I.R.1982 Del.357; *Taxmaco Ltd v. State Bank of India,* A.I.R.1979 Cal.44; *United Commercial Bank v. Bank of India,* A.I.R.1981 S.C.1426= (1981)2 S.C.C.766= 83 Bom.L.R.379; *State Bank of India v. Economic Trading Company,* A.I.R.1975 Cal.145.

R.Muthukumaraswami, for Appellant.

K.K.Venugopal for S.Ramalingam, Elamurugan and C.Hanumantha Rao, for Respondents.

The Judgment of the Court was delivered by

Shanmukham, J.:- In these appeals, three common questions arise for consideration. They are (1) Whether the three bank guarantees executed by the 2nd respondent bank in favour of the 1st respondent are independent contracts divorced from the contracts entered into between the appellant and the 1st respondent titled contract No.II. (ii) Whether they are conditional or unconditional contracts and (iii) Whether the 1st respondent's demand on the 2nd respondent bank when the former sought to enforce the bank guarantees is in conformity with the terms contained in these guarantees.

2. The appeals are directed against the common order of Maheswaran, J. made in Applications Nos.188 to 190 and 402 to 404 of 1983 dated 30th April, 1983. In all these applications, the appellant was the applicant while respondents 1 and 2 were the respondents therein. O.S.A.No.85 of 1983 is against Application No.403 of 1983; O.S.A.No.86 of 1983 is against Application No.188 of 1983; O.S.A.No.87 of 1983 is against Application No.189 of 1983 and O.S.A. No.88 of 1983 is against Application No.404 of 1983. It may be noticed that no appeals were preferred against Application Nos.190 and 402 of 1983.

3. The admitted facts that led to the filing of these interlocutory applications, are set out below. Neyveli Lignite Corporation Limited proposed to start a second lignite mine at Neyveli with the approval of the Government of India. In view of the importance and urgency in the execution of the said proposal, a global tender was called for by the 1st respondent Neyveli Lignite Corporation Limited, Finally, the offer made by M/s. Transellektro was accepted by the 1st respondent. The contract between the 1st respondent and Tansellektro is titled contract No.1. The said contract enabled M/s. Trnaselktro to choose an Indian firm for erection work accordingly, the applicant was selected as the Indian firm for erection work. Besides, Transelktro has a corporate agreement with E.V.T.West Germany. A tripartite agreement was concluded amongst Transelktro, E.V.T.West Germany and the 1st respondent covering the scope of equipments

under contract No.1 and between the applicant and the 1st respondent under contract No.II. On 18th October, 1980 the 1st respondent issued letters of intent not only to Transelktro under contract No.I, but also to the appellant under contract No.II. This letter of intent authorised the commencement of the work which also provided for time schedule. It is enough to refer to some of the relevant clauses in contract No.II. The contract price in respect of contract No.II was Rs.23,64,36,823 which is made up of India supplies. Rs.14,52,56,025, erection and commissioning Rs.8,72,90,000 and service charges Rs.38,90,798. The terms of payment for the price component of the equipment and its erection are as follows:

(a) Initial advance of 10% on supplies;
(b) 10% of erectioning charges to be made within one month from the date of letter of indent;
(c) 10% of the value of supplies within the next one month;
(d) 55% against despatch of equipment;
(e) 15% on receipt of equipment;
(f) 10% on completion of the performance test;

The contractor namely, the appellant was to furnish a bank guarantee to

> " ...cover the advance amount to be paid under (a), (b) and (c) above. With provision for pro rata reduction as contemplated by the contract. The contract provides for termination of the contract under two heads."

Clause 40(1) enables the 1st respondent to terminate the contract on the basis of certificate issued by the consultants. Clause 40(6) provided that in case of termination of the contract, the 1st respondent shall give detailed reasons for relevant causes within 30 days prior to such a decision and/or notice to be intended to the appellant in order to enable the 1st respondent/ consultant and the appellant to confirm and control all causes and facts for the proper solution of works. Clause 23(1) provides for arbitration in case of difference, dispute, etc. For the first 10% of initial advance on the price amount by the 1st respondent to the appellant the 2nd respondent bank executed bank guarantee No.11/13 on 12th March, 1981 for Rs.1,45,25, 602.50. For the second 10% of the initial advance made by the 1st respondent to the appellant the 2nd respondent bank executed bank guarantee No.11/94 dated 2nd June, 1981 for Rs.1,45,25, 602.50 and for 10% of the initial advance in respect of erection charges made by the 1st respondent to the appellant, the 2nd respondent executed bank guarantee No.11/121, dated 1st August, 1981 for Rs.87,29,000. On 2nd January, 1982, the 1st respondent issued notice both to Transelektro and the appellant for termination of the contract. The appellant and Trnaselektro took exception to the said termination. On 15th June, 1982, the appellant made reference to arbitration relating to several questions which included the right of the 1st respondent to terminate the contract and also to enforce the bank guarantees. On 1st July, 1982 the 1st respondent filed O.P.No.191 of 1982 under section 33 of the Arbitration Act for declaration that the arbitration proceedings commenced by the appellant on 15th June, 1982 is illegal and for stay of the said arbitration proceedings. In the meanwhile on 30th September, 1982, a joint proposal was made by Transelektro and the appellant which according to the appellant, was also accepted and acted upon by the 1st respondent. The relevant features to be noticed for the disposal of these appeals are:- (a) Though originally the appellant had to manufacture 22,000 tonnes of steel structures by virtue of the joint proposal the same was reduced to 3,450 tonnes of structures with the appellant's own steel. (b) Transelektro was to supply required steel for all remaining indigenous manufacture. (c) Fabrication of all such indigenous materials was to be sub-contracted to selected Indian parties in consultation with Transelektro. (d) A sum of Rs.5.06 crores from the contract price of the appellant for supplies was to be reduced. As the controversy rested on paragraph 2(b)

in the letter dated 30th September, 1982 from M/s. Transelektro to the Chairman cum Managing Director of the 1st respondent, we propose to extract the said clause:-

"To overcome the difficulties occurred regarding the provision of erection crane for which import finance is not possible V.E.Transelektro is ready to supply one or two cranes which suit the purpose of erection works, on a lease basis against the payment in foreign exchange equal to Rs.75,00,000. This amount can be met by deducting an equivalent amount from the erection portion of VE's contract. Necessary help will be required from NLC for getting the licence for temporary import of the cranes. NLC will have no other financial liability in respect of the cranes except transfer of Rs.75,00,000 from Vinay's contract to EE's contract in DMS. The detailed terms of payment regarding the leasing of the above crane shall be discussed and mutually agreed upon."

On 8th December, 1982, the 1st respondent called upon the appellant to finalise the sub-contracting arrangement on or before 20th December, 1982. The appellant is said to have finalised the sub-contracting arrangement which is also alleged to have been approved by the 1st respondent. On 23rd December, 1982, Transelektro sent a telex to the 1st respondent which is as follows:

"Mr.K.Sastry, Director, Finance, N.L.C. This is to thank you before all for your all-out efforts to achieve progress in the matter of finalising the amendments during my stay. It is however with regret that I have to advise you that due to the last minute postponement by you of making binding commitment we were incapable to achieve further extension of the option with the owners of the cranes. The owners went out of their way with us in accommodating you but were not in the position to keep the matter in suspense any longer against ruling of authorities to use the cranes for a Government Project. The crane being essential element of the erection scheme we only hope that your efforts in procuring the same will be successful the more as it has enjoyed full support of KEW from its inception. KEW has been informed simultaneously. Best regards, Linder - Transelektro."

The reply sent by the 1st respondent to Transelektro is dated 24th December, 1982 and is extracted below:-

"From K.S.Sastry Director/Finance NLC for M/s. Trnaselektro Attn: Mr.Linder. We are in receipt of your telex dated 24th December, 1982 through Ms.Khomka. To say the least we are shocked and disappointed. This is not in accordance with the spirit of discussions or agreement reached so far. We have to reiterate that NLC have given you all necessary clearances to your entire proposals before the due date, viz. 20th December, 1982 required by you including for cranes. In fact but for our insistence and pressure you would not have been able to finalise proposals and issue letters of intent to sub-contractors. Even during last meeting on 19th December, 1982 I made it very clear that you should go ahead with complete proposals including leasing of cranes. We have to categorically state that as per contract it is for Trnaselektro and Vinay Engineering to make necessary arrangements for cranes required craned Ecc for the erection. This is also as per agreement reached at Frankfurt during discussions in October, 1982, NLC is not in a position or prepared to take responsibility for providing of the required cranes at this stage nor is it possible to obtain necessary foreign exchange and import formalities for this import; Government of India also will view your present attitude to go back on your agreed proposals with very great concern. Kindly therefore immediately make necessary arrangements in accordance with agreements already reached and

as per your proposal dated 30th September, 1982 and 4th December and confirm. We are also making copy of this to KEW for information; Regards K.S.Sastry."

On 17th January, 1983 the 1st respondent wrote a letter to the 2nd respondent bank invoking three bank guarantees and demanding full payment on the ground that the appellant had failed to fulfil its obligations under the contract. In the meeting held on 18th January, 1983 the 1st respondent had informed the appellant that Transelektro expressed its inability to provide erection crane which was essential for the appellant to carry out erection work and therefore directed the appellant to make alternative arrangements for erection crane or to find out sub-contractors of erection. On 19th January, 1983 the 1st respondent issued notice of termination of contract No.II. As already stated, the 1st respondent on 17th January, 1983 sought to enforce the bank guarantees. It is relevant to state here that the 1st respondent wrote three letters all dated 19th January, 1983 to the Senior Manager, Bank of Baroda, New Delhi, demanding payment forthwith of the guarantee amount stating that the appellant had failed to fulfil its obligations under the contract. To these letters, the 2nd respondent bank sent three replies all dated 19th January, 1983 informing the 1st respondent that the latter's demand was being examined by the former's solicitors and the bank would be writing to the latter in this matter on hearing from the solicitors. Immediately, on 19th January, 1983, the branch office of the 1st respondent at New Delhi wrote to the Senior Manager, 2nd respondent bank three letters stating that in respect of bank guarantee numbers 11/13 and 11/94, the appellant had failed to fulfil its delivery obligations under the contract, while in respect of bank guarantee No.11/121, the appellant had failed to fulfil its erection and commissioning obligation under the contract. It may be useful to notice that in the bank guarantee No.11/94 under clause 3 on the advice by the 1st respondent to the 2nd respondent that the appellant had failed to fulfil its delivery obligations stipulated in the contract, the 2nd respondent bank is bound to pay the guarantee amount. As the contract stipulated that the advice should be that the appellant had failed to fulfil its delivery obligations of erection and commissioning stipulated in the contract regarding bank guarantee No.11/121, the branch office of the 1st respondent at New Delhi wrote the three letters dated 19th January, 1983 quoting the very expression stipulated in the bank guarantees.

4. Application No.188 of 1983 is for an injunction restraining the 2nd respondent bank from making any payment to the 1st respondent under the three bank guarantees, while Application No.189 of 1983 is for an injunction restraining the 1st respondent from invoking and receiving any payment under the said bank guarantees. The reliefs claimed in both the said applications are the same and that is to restrain the 1st respondent from enforcing the three bank guarantees. The relief is again claimed in Application No.404 of 1983, while what is claimed in Application No.189 of 1983 is claimed in Application No.403 of 1983. The learned Judge finally dismissed all the four applications. Hence, these appeals by the same applicant in all these said applications.

5. The learned Advocate General appearing for the appellant submitted that the bank guarantees are not independent contracts and that on the other hand, their enforcement depended on the applicant's laches or default in its performance of contract No.II and that therefore, 1st respondent's enforcement of these guarantees is arbitrary, illegal and fraudulent. The second contention is that the bank guarantees are conditional and that unless the 1st respondent satisfied that the appellant had failed to perform its obligations under the contract, the 1st respondent is not entitled to invoke the bank guarantees and the

demand payments. It is also argued that in any event, the 1st respondent's demand for enforcement of bank guarantees is not in conformity with the terms therein.

6. In *M.S.E.S.Bombay v. Official Liquidator, H.C.Ernakulam*, (1982)3 S.C.C.358= A.I.R.1982 S.C.1497 the terms of the bank guarantee are set out in paragraph 3 and are as follows:-

> "Pursuant to the above term, the Company in liquidation offered on September 1 , 1966 a bank guarantee for a sum of not exceeding Rs.50,000 given by the Canara Bank Ltd. (now known as Canara Bank and hereinafter referred to as the Bank). The relevant part of the said guarantee was as follows:
>
> "The Canara Bank Ltd." , hereby agrees unequivocally and unconditionally to pay within 48 (forty eight) hours on demand in writing from the Maharashtra State Electricity Board or any officer authorised by it in this behalf of any amount upto and not exceeding Rs.50,000 (Rupees Fifty Thousand only) to the said Maharashtra State Electricity Board, Bombay, on behalf of M/s.Cochin Malleables (Private) Ltd. Trichur who have tendered and/or contracted or may tender or contract hereafter for supply of materials, equipment or service to the Maharashtra State Electricity Board and have been exempted from payment of earnest money and or security deposit against such tenders or contracts."

While construing the bank guarantee, the following dictum was laid down by the Supreme Court:

> "The principal question which arises for determination in this appeal relates to the effect of the liquidation proceedings on the right of the Electricity Board to recover from the Bank the sum of Rs.50,000 as per the terms of the bank guarantee. It cannot be disputed that the terms of the document on the basis of which the Electricity Board has claimed the amount from the Bank constitute a contract of guarantee and not a contract of indemnity. Under that document the Bank has undertaken to pay any amount not exceeding Rs.50,000 to the Electricity Board within forty-eight hours of the demand. The payment of the amount guaranteed by the Bank is not made dependent upon the proof of any default on the part of the Company in liquidation. It may be that in order to give the said guarantee the Bank had in its turn taken as security from the Company in liquidation certain fixed deposit receipts and a certain quantity of imported zinc ingots and that the Bank had certain rights in respect of those securities. There may also be some claims or counter claims arising out of the contracts of supply entered into between the Electricity Board and the Company in liquidation. But the transactions, viz. (1) the bank guarantee executed by the Bank in favour of the Electricity Board, (2) the contracts of supply entered into between the Electricity Board and the Company in liquidation, and (3) the document under which the Company in liquidation had given a fixed deposit receipt and certain quantity of zinc ingots as security to the Bank for executing the letter of guarantee in favour of the Electricity Board are independent of each other in so far as their legal incidents are concerned. The Bank cannot raise the plea that it is liable only to the extent of any loss that may have been sustained by the Electricity Board owing to any default on the part of the supplier of goods, i.e. the Company in liquidation. The liability is absolute and unconditional."

A learned Judge of Delhi High Court in *N/s. B.L.R.Mohan v. P.S.Co-op., S.A.M.Federation Ltd.*, A.I.R.1982 Delhi 357 had succinctly stated thus:-

> The performance guarantees or performance bonds, a comparatively recent species of Banker's commercial credit

has many similarities to a letter of credit. Such guarantees, even though having their genesis in the primary contract between the parties, are nevertheless "autonomous" and independent contracts and the bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer, nor with the question whether the supplier had performed his contracted obligations or not, nor with the question whether the supplier is in default or not and the only exception is when there is a clear fraud of which the bank has notice. In short these guarantees impose an absolute obligation on the banks to pay on demand in their terms and the courts usually refrain from interfering with the obligation, except in rare cases of fraud.

The performance guarantee is an "autonomous" contract and imposes an "absolute obligation" on the bank in its terms. As such the existence of disputes between the parties under the primary contract or the possibility of a reference of these disputes to arbitration or of the pendency of proceedings on such a reference have absolutely no relevance to the obligation of the bank under the guarantee. The banks are bound to pay without demur irrespective of the pendency of any arbitration proceedings or the imminence of any reference to arbitration of the disputes between the parties arising out of the primary contract between the parties.

However, such an obligation arises only if the conditions of the bond are satisfied and if the demand made on the bank is in strict accord with its terms. Any demand which is outside the terms of the guarantee bond and any payment by the bank without strict compliance with the terms of the bound would not be beyond the scope of the bond and would not give discharge to the paying banker."

In *Texmaco Ltd. v. State Bank of India*, A.I.R.1979 Calcutta 44 a learned Judge of that Court had stated the law thus:-

"Where though the guarantee was given for the performance by the party on whose behalf guarantee was given, in an orderly manner its contractual obligation, the obligation was undertaken by the bank to repay the amount on "first demand" and without contestation, demur or protest and without reference to such party and without questioning the legal relationship subsisting between the party in whose favour guarantee was given and the party on whose behalf the guarantee was given, " and the guarantee also stipulated that the bank should forthwith pay the amount due notwithstanding any dispute between the parties aforesaid, it must be deemed that the moment a demand was made without protest and contestation, the bank had obliged itself to pay irrespective of any dispute as to whether there had been performance in an orderly manner of the contractual obligation by the party. Consequently, in such a case, the party on whose behalf guarantee was given was not entitled to an injunction restraining the bank in performance of its guarantee."

Even in respect the letters of credit, the following principles are settled by the Supreme Court in *United Commercial Bank v. Bank of India*, (1981)2 S.C.C.766= 83 Bom.L.R.379= A.I.R.1981 S.C.1426.

"The courts usually refrain from granting injunction to restrain the performance of the contractual obligations arising out of letter of credit or a bank guarantee between one bank and another. If such temporary injunctions were to be granted in a transaction between a banker and a banker, restraining a bank from recalling the amount due when payment is made under reserve to another bank or in terms of the letter of guarantee or

credit executed by it, whole banking system in the country would fail. It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce. The machinery and commitments of banks are on a different level. They must be allowed to be honoured, free from interference by the courts. Otherwise, trust in international commerce could be irreparably damaged.

No injunction could be granted under Order 39, rules 1 and 2 of the Code unless the plaintiffs establish that they had a *prima facie* case, meaning thereby that there was a *bona fide* contention between the parties or a serious question to be tried.

A payment "under reserve" is understood in banking transactions to mean that the recipient of money may not deem it as his own but must be prepared to return it on demand. The balance of convenience clearly lies in allowing the normal banking transactions to go forward. Furthermore, the plaintiffs have failed to establish that they would be put to an irreparable loss unless an interim injunction was granted."

In *State Bank of India v. Economic Trading Co.*, A.I.R.1975 Calcutta 145 cited by the learned Advocate-General, a Division Bench of the Calcutta High Court has observed as follows:-

"A bank guarantee has a dual aspect. It is not merely a contract between the bank and the beneficiary of the guarantee, it is also a security given to the beneficiary by a third party. In seeking to enforce the guarantee, the beneficiary, in effect seeks to realise the security furnished by the third party and the third party has, therefore, *locus standi* to challenge the enforcement of the guarantee. In the case of a letter of credit, however, courts are slow to interfere with its operation not merely on the ground of their importance, in international trade but also on the ground that the beneficiary is assured of the payment by the bank once he had complied with the terms and conditions of the letter of credit irrespective of his non-compliance with the contract into which he had entered with the third party or in other words on the ground of autonomy of the letter of credit."

7. The following principles are thus well settled:- If the bank guarantees are (sic) unconditional the bank has no defence when its guarantee is sought to be enforced. It is the document of guarantee that has to be scanned to ascertain whether the guarantee is conditional or otherwise and whether it is an autonomous contract by itself. Ordinarily, the Court shall not grant an injunction restraining enforcement of such bank guarantees save where there is a clear case of fraud of which the bank had notice and where the special equity was in favour of the beneficiary under the bank guarantee, in the instant case, the appellant.

8. In other words, there is no absolute fetter on the Court to grant injunction.

9. Thus, the disposal of these appeals principally rests on the construction of the three bank guarantees. The terms and conditions of all the three bank guarantees are in identical terms except that in bank guarantee No.11/121 the amount of guarantee is Rs.87,29,000 and the 1st Respondent's advice under clause 3 related to erection and commissioning stipulated in the contract No.II. It is therefore enough to extract guarantee No.11/3.

"Advance Payment No.11/13 Pursuant to the Contract hereinafter referred to as "The Contract" which Messrs. Vinay Engineering, a sole proprietary unit of Priya Engineering Company Limited, B.6/4 (2nd Floor) Community Centre, Safdarjung Enclave, New Delhi-110029 hereinafter referred to as "Contractor" have concluded with Neyveli hereinafter referred to as the "Purchaser" on the 18th

October, 1980 the Contractors have undertaken to manufacture and supply indigenous equipment Ex-works in India and erect and commission indigenous equipments and also the equipments manufactured and supplied by M/s. Transelektro of Budapest, Hungary for 3 Nos. of Steam Generators with Auxiliaries of Neyveli Second Thermal Power Station particularly listed in the Purchaser's letter of Intent Lr.No.2700 K/H. II.T/80-276 dated 18th October, 1980 of the contract as per the prices indicated hereunder against each -

(a) Supplies Ex-works	Rs.14,52,56,025
(b) Erection, Testing and Commissioning	Rs. 8.72,90,000
(c) Service Charges	Rs. 38,90,798
Total	Rs. 23,64,36,823

(Rupees Twenty-three Crores, Sixty-four lakhs, thirty-six thousand and eight hundred and twenty-three only)

2. According to the said contract, the purchaser has undertaken to make an advance payment of Rs.1,45,25,602.50 (Rupees One crore forty-five lakhs, twenty-five thousand and six-hundred and two and paise fifty only) being the first initial advance payment of 10% for supplies of indigenous equipments of the Contract value against issuance of an advance payment guarantee by a bank.

3. For this advance payment, we the undersigned Bank of Baroda hereby guarantee to the effect that we irrevocably undertake to pay to the purchaser upon the Purchaser's first demand and without demur the amount paid by the purchaser in advance or part thereof, but not exceeding Rs.1,45,25,602.50 (Rupees One crore, forty-five lakhs, twenty-five thousand and six hundred and two and paise fifty only) provided the purchaser advises us that the Contractor has failed to fulfil his delivery obligations stipulated in the said Contract.

4. This advance payment guarantee will become effective only as soon as the amount of Rs.1,45,25,602.50 (Rupees One crore, forty-five lakhs, twenty-five thousand and six hundred and two and paise fifty only) has been received at the free disposal of the Contractor.

5. This guarantee shall be valid till 11th March, 1984 and the Purchaser has the right to encash the Bank guarantee upto 60 days from the said date. Unless a claim has been lodged or action taken against us under this guarantee before the said date, we the Bank of Baroda shall be deemed to be discharged of our liability and no action shall lie against us thereafter.

6. Further, we the undersigned Bank of Baroda hereby undertake to furnish suitable fresh Bank guarantee for advance payment at the instance of the Contractor for such reduced sum reckoning the proportionate progress of supplies/work carried out by the Contractor as intimated by the purchaser so as to make the guarantee continous till the obligations under the said contract have been fulfilled by the Contractor. However, the entire period of guarantee from date of first issuance shall not be more than 60 months.

7. Our liability will be deemed to be reduced pro-rata as and when adjustments are made against the running bills submitted by the Contractor.

8. In any case our liability under this advance payment guarantee shall not exceed Rs.1,45,25,602.50 (Rupees One Crore, forty-five lakhs, twenty- five thousand and six hundred and two and paise fifty only).

9. This guarantee deed must be returned to us duly discharged upon the expiration of the guarantee.

10. Letter of intent No.2700 K/H III/80, 276, dated 18th October, 1980 is enclosed.

10. The plain reading of clause 3 unmistakably points out that the bank guarantees are irrevocable and that on the 1st respondent's demand and on the 1st respondent advising the 2nd respondent that the appellant had failed to fulfil its delivery obligations in respect of bank guarantee 11/13 and 11/94 and failed to fulfil its obligations of erection and commissioning as regards bank guarantee 11/121 the bank is bound to make the payments forthwith. It is relevant to notice that what was enough for the 1st respondent to enforce the bank guarantees is to advise the 2nd respondent that the appellant had failed to fulfil his delivery obligations in respect of the first two bank guarantees and failed to fulfil its obligations of erection and commissioning in respect of bank guarantee 11/121, notwithstanding whether such advice is well-founded or not. We shall emphasise that whether such advice by the 1st respondent to 2nd respondent is valid or not, is not the concern of the 2nd respondent bank, but it is a matter to be fought between the 1st respondent and the appellant.

11. So too, it is not possible to construe these documents having any link with contract No.II in their enforcement as contended by the learned Advocate-General. It is easy to perceive that in such a case, the bank guarantee will lose its efficacy in banking operations. For, any dispute touching the contract as such had to be settled by the arbitrator and if so, these documents shall not be enforced until then. The plain tenor of these documents will repel such a contention. Indeed, our approach finds support from the dictum of the Supreme Court in *M.S.E.B. Bombay v. Official Liquidator, H.C. Ernakulam*, (1982)3 S.C.C.358= A.I.R.1982 S.C.1497. The form of guarantee considered by the Supreme Court is almost similar to those under our consideration except that in the instant case, the 1st respondent had to advise that the appellant either failed to fulfil its delivery obligations or its erection and commissioning obligations. Though in its three letters all dated 17th January, 1983, the 1st respondent did not actually use the term that the appellant had failed to fulfil its delivery obligations in respect of the first two guarantees and its erection and commissioning obligations under the contract, the branch office of the 1st respondent at New Delhi did send three communications dated 19th January, 1983 specifically advising the 2nd respondent that the appellant had failed to fulfil its delivery obligations as also erection and commissioning obligations under the contract. The learned Advocate General would submit that the three communications sent by the branch office to the 1st respondent would not cure the defect inherent in the first three letters dated 17th January, 1983 written by the 1st respondent's head office and therefore, the 1st respondent's demand invoking the bank guarnatees is not in conformity with the terms contained therein. We are unable to agree. For, the crucial consideration is whether there was a demand by the 1st respondent as such but not whether such demand is by the head office or the branch office of the 1st respondent. In our opinion, it makes no difference whether the demand is by the head office or by the branch office. Thus, incidentally we hold that the 1st respondent's demand by virtue of its branch office's communications, dated 19th January, 1983 is in strict conformity with the tenor of three bank guarantees.

12. There is yet another material factor that has to be noticed at this stage. Clause 7 of the bank guarantee stipulates that the 2nd respondent's liability will be reduced pro-rata as and when adjustments are made against the running bills submitted by the appellant. Fortunately, for the 1st respondent, it had by its letter, dated 25th January, 1983 addressed to the Senior Manager, Bank of Baroda, New Delhi, referred to the various bank guarantees, its demands in its letter

dated 17th January, 1983, its demand in its branch office, letter dated 19th January, 1983 and gave credit to the pro-rata amount to be adjusted, *i.e.* 10% of the value of supplies accepted for adjustment in the guarantees in respect of guarantee numbers 11/13 and 11/94. It is common ground that at that time there was no amount to be adjusted in respect of the third bank guarantee. It is useful to point out that after such adjustment, the amount due under each of the bank guarantees is Rs.1,39,13, 768.24 while in respect of the third, the whole amount of Rs.87,29,000. Thus, the documentary evidence in this case conclusively establishes that the 1st respondent's demand on the 2nd respondent was in strict compliance with the terms in the guarantees. As such, on the principles of law settled by the Supreme Court, the 2nd respondent bank had no escape whatever, but to pay the amount to the 1st respondent.

13. There is yet another vital feature to be noticed in this case. The bank guarantee came to be executed in respect of advance payments made by the 1st respondent to the appellant well in advance. By the enforcement of these guarantees, the 1st respondent is only trying to recall its advance payments. This in our view will disable the appellant from claiming any equity, much less special equity. Above all, it is significant to point out that at the time of payment of those advances by the 1st respondent to the appellant, it was on the expectation that the appellant was to manufacture 22,000 tonnes of structures with their own steels while by virtue of the joint proposal made by Transelektro on 30th September, 1982, which we had occasion to refer to, the appellant's obligation was reduced to 3,450 tonnes. Then, we have no hesitation to conclude that the appellant is not at all entitled to invoke equity to his support. In other words, no special equity can be invoked by the appellant to sustain the relief of injunction as prayed for it.

It may not be out of place to refer to the telex sent by Transelektro on 23rd December, 1982 to the 1st respondent. We had in fact extracted the said document earlier. It is seen from the said document that Transelektro had expressed its inability to provide the crane to the appellant without which erection work could not be done. No doubt, the learned Advocate-General submitted that by virtue of a joint proposal made by Transelektro and the appellant on 30th September, 1982 which was accepted by the 1st respondent, the appellant was relieved of its obligations to procure the crane and that therefore, if Transelektro were unable to procure such crane, the appellant is not to be blamed at all and that therefore, the 1st respondent cannot complain that the appellant had not fulfilled its obligations. Though it may not be germane, yet as the matter was argued, we propose to deal with the same. The relevant part of the joint proposal is paragraph 2(b) and we have already extracted the same. Assuming that the 1st respondent had accepted the joint proposal as set out is Transelektro's letter of 30th September, 1982, yet we are unable to read paragraph 2(b) as relieving the appellant from its responsibility in finding out the crane. A fair reading of paragraph 2(b) only shows that what was agreed if at all by the 1st respondent is that the amount of Rs.75,00,000 should be made by deducting the equivalent amount from the erection portion of the appellant's contract and that necessary help should be rendered by the 1st respondent for getting the licence for necessary import of the cranes. Thus, it is quite obvious that the appellant could not obtain for its use the requisite crane and, consequently, could not complete erection and commissioning as stipulated in the contract.

15. It was also contended by the learned Advocate-General that one of the issues to be decided by the Arbitrator is whether 1st respondent is entitled to invoke the bank guarantees of any of them because of the termination of the contract by the 1st respondent's notice dated 19th January,

1983 being invalid, that therefore the matter is within the exclusive jurisdiction of the Arbitrator and that it is not expedient on the part of this Court to collaterally decide that issue. The mere fact that that was also one of the points left to the Arbitrator, will in no way remain a fetter on the absolute right inhered in the 1st respondent to enforce the bank guarantee for the reasons already stated. We may add that if it were to be found that the invocation of the bank guarantee by the 1st respondent is not valid, it will not clothe either the appellant or the 2nd respondent to successfully desist the enforcement of the unconditional bank guarantees by the 1st respondent as explained by us and that if at all, the remedy of the appellant and the 2nd respondent lay only in damages. In our view therefore the above contention, makes no advance to the appellants case. In conclusion, we find that the appellant had not made out any case whatever to sustain the relief of injunction prayed for in all these applications and that the order of the learned Judge is quite correct.

16. The result is, all these appeals fail and are dismissed, but in the circumstances of the case without costs.

17. We have followed the principles of law as settled by the Supreme Court. So, the leave orally asked for is declined.

R.S. ----- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *S.Nainar Sundaram, J.*

*S.A.No.237 of 1979. 29*th August*, 1984.

A.R.Krishnamurthy *Appellant**

v.

Arni Municipality, Arni, North Arcot Dt. by its Commissioner *Respondent.*

Contract Act (IX of 1872), section 73 - Scope and applicability - Suit for damages - Duty of the plaintiff to take reasonable steps to mitigate loss - Failure to mitigate - Effect - Right to claim damages barred.

The main part of section 73 of the Indian Contract Act contemplates recovery of damages caused by reason of breach of contract, as per the principles set out therein. But damages for the loss recoverable stand qualified, limited or circumscribed, by another principle set out in the Explanation to section 73 of the Act. In estimating damages or loss, the means which existed for remedying the damages should always be taken into account. The damages or loss recoverable is limited by the test of what a prudent man as per the circumstances prevailing should have reasonably done to mitigate the damages. A party omitting to take advantage of the existing and obvious means of remedying or diminishing the damages consequent upon the breach of contract cannot recover such portion of the damages or loss equitably due to his own negligence and lethargy. In other words damages or loss, which might have been avoided by the exercise of ordinary prudence and common inteligence is not recoverable. *[Para.4]*

The second principle to govern the award of damages is that there is a duty cast upon the plaintiff to take all reasonable steps to mitigate the loss consequent on the breach and if there is a failure to discharge the duty and obligation it will debar him from

claiming any part of the damages which is due to his negligence to take such steps. *[Para.5]*

Case referred to:-

M/s. Muralidhar v. M/s. Harischandra, (1962)1 S.C.J.462= (1962)1 S.C.R.653= A.I.R.1962 S.C.366.

D.Peter Francis and P.R.Venkatasubramanian, for Appellant.

C.Chinnaswami, M.Shakir Ali and P.Chandrasekran, for Respondents.

The Court delivered the following

JUDGMENT:- The defendant in O.S.No.767 of 1973 on the file of the District Munsif of Arni, is the appellant in this second appeal. The plaintiff in the suit is the respondent herein. The plaintiff which is a Municipality, conducted auctions of leases of two bunks. In the auction, the defendant participated and he was the highest bidder for the first bunk for Rs.3,210 and for the second bunk for Rs.3,050. It is admitted that there was a second hihgest bidder, who had bid for the first bunk for Rs.3,200 and for the second bunk for Rs.3,010. The highest bids of the defendant were confirmed by the plaintiff, but since the defendant did not pay the advance of three month's kist as per condition 14 of the Conditions of Auctions, in spite of repeated demands, the leases in his favour of the two bunks were cancelled and the bunks were re-auctioned at the risk of the defendant and on such re-auction, the first bunk fetched only a sum of Rs.550 and the second bunk fetched only a sum of Rs.520. The plaintiff laid the suit for recovery of damages as the difference between the bids of the defendant and the bids at the second auction deducting the earnest money of Rs.200 already paid by the defendant. The defendant contested the suit, stating that there was no concluded contract and in any event the plaintiff ought to have confirmed the second highest bids of the first auction, having kept alive the second highest bids by retaining the earnest deposits made by the second highest bidder of the first auction and if done so, the damages would have got mitigated. The first court held that there was a concluded contract; however, the first court countenanced the plea of the defendant on the question of failure on the part of the plaintiff to mitigate the damages on the facts pleaded and proved, and in this view, the suit of the plaintiff was dismissed but without costs. The plaintiff appealed. In the appeal, the defendant wanted to canvass the aspect that there was no concluded contract between the plaintiff and the defendant. The lower appellate Court did not permit the defendant to canvass this aspect on the ground that he has not filed a cross objection to the finding in this behalf rendered by the first court. On the question of damages the lower appellate Court has chosen to take a view different from the one expressed by the first court and, opining that the plaintiff has taken all the steps to mitigate the damges, reversed the judgment and decree of the first court by allowing the appeal, and the suit of the plaintiff was decreed with costs. The lower appellate Court also allowed costs in the appeal before it. This second appeal is directed against the judgment and decree of the lower appellate Court.

2. At the time of admission of this second appeal, the following substantial questions of law were mooted out for consideration:-

1. Whether the lower appellate court is right, in holding that the appellant cannot canvass the finding rendered against him by the trial court because he has not filed any cross objections against that finding *i.e.* regarding the validity of the contract and whether the view of the lower appellate court is contrary to Order 41, rule 22, of the C.P.C.?

2. Whether the lower appellate Court is correct in holding that on a proper interpretation of the terms of the contract the plaintiff is entitled

to damages and in further holding that the plaintiff is entitled to be indemnified in whole of the sum claimed as damages?

3. With regard to the first substantial question of law, Mr.D.Peter Francis, learned counsel for the appellant, did not press forth the same in view of an assessment of the legal position with regard to the facts disclosed in the case. I am inclined to agree with the learned counsel for the appellant that there has been an omission on the part of the lower appellate court to apply the correct principles on the question of mitigation of damages. It is true that the defendant committed breach of the obligations cast on him. It is true that the plaintiff got the right to re-auction the bunks when there was a failure on the part of the defendant to pay the advance of three months kist as per the conditions stipulated. It is also true that at the second auction, the bids were for meagre amounts. But, the evidence has disclosed that the second highest bids of the first auction were kept alive and the plaintiff had preserved the right to accept the second highest bid of the first auction in case of failure to fulfil his obligation by the first highest bidder and that was the reason why the second highest bids of the first auction were kept alive by retaining the earnest money deposits made therefor and the plaintiff has not offered any explanation for ignoring the second highest bids of the first auction kept alive and falling back upon the bids obtained at the second auction which bids were admittedly for meagre amounts. The Junior Assistant of the plaintiff, examined as P.W.1 had deposed that the amounts deposited by the second highest bidder of the first auction have been retained by the plaintiff municipality to confirm the leases in his favour if it is to be found that the leases could not be concluded in favour of the first highest bidder in the first auction, namely the defendant. It is not made out by the plaintiff that the second highest bids of the first auction stood abrogated at any relevant point of time, and in any event, anterior to the second auction by returning the amounts deposited therefor, so that it could be stated that the second highest bids of the first auction could not be taken note of and implemented further. It is also not demonstrated by the plaintiff that the second highest bidder of the first auction declined to accept the grant of the leases in his favour in respect of the two bunks. On the other hand, that there is scope for accepting the second highest bids of the first auction in case the first highest bids of the first auction could not be implemented and prosecuted, is evident from rule 11 of the Auction Rules. Such being the factual position, I am of the view that the Explanation to section 73 of the Indian Contract Act, hereinafter referred to as the Act, would squarely come into play and there is a blatant omission on the part of the plaintiff to remedy the situation and mitigate the damages even though as established by the facts in the case, it had the means to do so.

4. Explanation to section 73 of the Act reads as follows:

> "In estimating the loss or damage arising from a breach of contract, the means which existed for remedying the inconvenience caused by the non-performance of the contract must be taken into account."

The main part of Section 73 of the Act contemplates recovery of damages caused by reason of breach of contract, as per the principles set out therein. But the damages or loss recoverable stand qualified, limited or circumscribed, by another principle set out in the Explanation to section 73 of the Act. In estimating damages or loss, the means which existed for remedying the damages should always be taken into account. The damages or loss recoverable is limited by the test of what a prudent man as per the circumstances prevailing should have reasonably done to mitigate the damages. A party omitting to take advantage of the existing and obvious

means of remedying or diminishing the damages consequent upon the breach of contract, cannot recover such portion of the damages or loss equitable to his own negligence and lethargy. In other words, damages or loss, which might have been avoided by the exercise of ordinary prudence and common intelligence, is not recoverable.

5. The second principle to govern the award of damages is that there is a duty cast upon the plaintiff to take all reasonable steps to mitigate the loss consequent on the breach and if there is a failure to discharge this duty and obligation, it will debar him from claiming any part of the damages which is due to his negligence to take such steps.' This principle has been recognised by the Supreme Court in *Messrs. Muralidhar v. Messrs. Harischandra*, (1962)1 S.C.J.462= (1962)1 S.C.R.653= A.I.R.1962 S.C.366. If this principle is applied, I find that the plaintiff could have as well resorted to the second highest bids of the first auction on the facts and circumstances disclosed and mitigated the damages to a very large extent, and hence the plaintiff has to confine its claim for damages for a sum of Rs.10 with reference to the first bunk and Rs.40 with reference to the second bunk, aggregating to Rs.50. But, we find that the plaintiff has with it already the moneys deposited by the defendant to the tune of Rs.200, which the plaintiff could adjust and, in fact, is inclined to adjust on the other basis towards the damages, and hence there is no need to pass a decree even for this sum of Rs.50. This obliges me to interfere in second appeal and accordingly, this second appeal is allowed; the judgment and decree of the lower appellate court are set aside; and the suit of the plaintiff will stand dismissed. In the peculiar circumstances of the case, I direct the parties to bear their respective costs throughout.

R.S. ----- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *G.Ramanujam and V.Ratnam, JJ.*

*W.P.No.413 of 1978. 12*th December,* 1984.

The Tamil Nadu Khadi and Village Industries Board, by its Secy. Kuralagam, Madras-1 *Appellant**

v.

Venkatesan and another *Respondents.*

Industrial Disputes Act (14 of 1947), section 33 (c)(2) - Claimant in receipt of salary - Services of employee dispensed with but later on reinstated - Claim by employee for arrears of salary - Claim rejected on allegation of his being employed in another occupation during the period for which claim was made - Opportunity to adduce evidence to prove it should have been given - Refusal of opportunity not justified.

An employee who filed a claim under section 33(c)(2) of the Industrial Disputes Act was alleged to have been employed during a part of the concerned period in another Department. The Labour Court did not allow the employer to adduce evidence to that effect as the concerned party was not ready with it when the matter was taken up.

Held:- Merely because the appellant had not filed an application for adjournment before the Labour Court, its request to be given an opportunity for producing the necessary documents cannot be said to be unreasonable or irrelevant.

It is by now well established that if, during the period for which a claim under section 33(c)(2) of the Industrial Disputes Act has been made, the claimant has been in receipt of salary or wages in another occupation, that should go to reduce the liability of the employer against whom the claim has been made. *[Para.2]*

Case referred to:-

A.R.Sambandham v. Central Govt. Labour Court, (1969) Lab.I.C.591= (1969)2 Lab.L.J.442= 35 F.J.R.154= A.I.R.1969 Mysore 196.

Appeal under clause 15 of the Letters Patent against the order of Mr.Justice Mohan, dated 8.2.1977 and made in the exercise of the Special Jurisdiction of the High Court in Writ Petition No.2699 of 1975, presented under Article 226 of the Constitution of India to issue a Writ of *Certiorari*, calling for the records pertaining to O.P.No.241 of 1971 on the file of the 2nd respondent Labour Court, including the common order of the 2nd respondent, dated 30.9.1974 passed therein and quash the said order in so far as it relates to O.P.No.241 of 1971.

The Judgment of the Court was delivered by

Ramanujam, J.:- This appeal is directed against the decision of Mohan, J. in Writ Petition No.2699 of 1975. The first respondent was employed as Chargeman, Grade I, in the Tamil Nadu Khadi and Village Industries Board, the appellant herein. His services were terminated by an order dated 23.9.1984 on the ground of his alleged failure to keep alive the security policy. The first respondent thereupon filed a Writ Petition No.3627 of 1965 in this Court and the order of termination of his services stood quashed in the said writ petition. Thereafter, the first respondent filed an application under section 33-C(2) of the Industrial Disputes Act, claiming arrears of salary from 23.9.1964 till 18.10.1970 when he was reinstated as a result of the order passed by this Court in Writ Petition No.3627 of 1965. In the claim petition filed before the Labour Court the total arrears of salary for the period from 23.9.1964 to 18.10.1970 was Rs.23,160/-. One of the defences taken in the said petition by the appellant herein was that the first respondent was not entitled to claim the entire amount of salary for the period in question as he was employed during a portion of the period in the Khadi Department of Ghadhi Gram between 22.10.1984 and 31.8.1969, and therefore, the appellant will not, in any event, be liable to pay arrears of salary for the said period when the first respondent was working in the Khadi Department at Gandhi Gram and receiving remuneration. On this point, the appellant wanted to adduce evidence, but the Labour Court has not chosen to give an opportunity to the appellant to produce evidence relating to the employment of the first respondent during a portion of the period for which the first respondent had claimed arrears of salary. The Labour Court has however, chosen to direct the appellant to pay the said sum of Rs.23,160/- claimed by the first respondent. Aggrieved against the said order the appellant filed a Writ Petition No.2699 of 1975, wherein it prayed for the issue of a writ of *certiorari* to quash the order of the Labour Court. The learned single Judge has chosen to dismiss the writ petition with the following observation:

> "The only ground of attack against the impugned order is that the petitioner was prevented from letting in evidence to the effect that the employee was under the employment of Khadi Department Gandhi Gram between 22.10.1964 and 31.8.1969 and the Labour Court refused an adjournment. In the result the petitioner was disabled from placing this valuable evidence. If the same was admitted, that would have gone towards reduction of the petitioner's liability. The learned counsel for the respondent would urge that this statement is made only for the purpose of the case and if the petitioner was earnest, it ought to have filed an application for adjournment. I am in agreement with what is submitted by the respondent. There is nothing on record to show that the Labour Court was moved for an adjournment for the purpose of letting in evidence and the same was refused. Therefore, this plea of the petitioner cannot be entertained at this stage."

It will be seen from the above order that since the appellant had not filed an application for adjournment for producing the necessary evidence, the learned Judge was of the view that it cannot now seek an opportunity for letting in the necessary evidence before the Labour Court. As a matter of fact, the learned counsel for the appellant has produced before us the letters received from Gandhi Gram showing that the first respondent was employed during a certain period and he was in receipt of certain remuneration. It is only to adduce evidence in respect of the first respondent's employment during a certain period, opportunity was asked, but the opportunity was not given by the Labour Court and the appellant came with the grievance that it was not given enough opportunity to produce evidence, by filing this writ petition.

2. It is not in dispute that the employment of the first respondent during the period for which claim was made, will be a relevant matter. It may be that the appellant was not in a position to adduce evidence at the time when the Labour Court took up the matter for consideration and, even though an opportunity was asked for by the appellant, the Labour Court did not choose to adjourn the matter for the purpose. But, merely because the appellant had not filed an application for adjournment before the Labour Court, its request for an opportunity for producing the necessary documents cannot be said to be unreasonable or irrelevant. If really, as contended by the appellant, the first respondent was employed during a portion of the period for which claim has been made in the claim petition under section 33-C(2) of the Industrial Disputes Act, he will not be entitled to claim back-wages for the said period. In this case, since there is a *prima facie* material produced before this Court showing that the first respondent was employed elsewhere during a portion of the period, the matter calls for a further enquiry by the Labour Court, and therefore, in the interests of justice, we feel that the labour Court should be directed to go into the question as to whether the first respondent was employed elsewhere and was in receipt of salary during the said period of employment. If the first respondent was employed during a portion of the period for which claim has been made and was in receipt of income, that would go towards reduction of the appellant's liability. Though the Labour Court, relying on a decision in *Sambandham v. Central Government Labour Court and another*, (1969)2 L.L.J.442: (1969) Lab.I.C.591= 35 F.J.R.145= A.I.R.1969 Mysore 196 has stated that it had no jurisdiction to find out whether, during the period for which the employee was entitled to back-wages, he got himself employed in another profit earning activity, we are of the view that it is by now well established that if, during the period for which claim under section 33-C(2) has been made, the claimant has been in receipt of salary or wages in another occupation, that should go to reduce the liability of the employer against whom the claim has been made. In this view of the matter, we allow the appeal and set aside the order of the Labour Court, with a direction that the Labour Court shall pass final orders after giving an opportunity to the appellant to put forward its case relating to the employment of the first respondent elsewhere during any portion of the period for which claim has been made. There will be no order as to costs.

---- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *P.R.Gokulakrishnan and G.Maheswaran, JJ.*

*O.S.A.No.136 of 1984. 13th *December,* 1984.

N.S.Paramananda Naicker *Appellant**

Succession Act (XXXIX of 1925), sections 225, 255 and 276 - Letters of Administration - Application for grant of, limiting it to a particular property - Can be granted where the case requires an exception to be made.

Held:- It is well settled that an application for probate or letters of administration must ordinarily be with reference to the will and the whole of the estate, but where the case requires an exception to be made, then the letters of administration or probate may be granted subject to such an exception. *[Para.5]*

Case referred to:-

Ramachandra Gowder v. Nanjappa, (1973)1 M.L.J.189= 85 L.W.727= A.I.R.1973 Mad.179.

Appeal under Clause 15 of the Letters Patent against the order of Venkataswami, J. dated 15th June, 1984 in O.P. .. of 1983 in Diary No.12079 of 1983.

S.Balasubramaniam, for Appellant.

T.N.Vallinayagam, Addl. Govt. Advocate, for Respondent.

The Order of the Court was made by

Maheswaran, J.:- This appeal is directed against the judgment of our learned brother, Venkataswami, J. passed in Diary No.12079 of 1983. The only question that arises in this appeal is whether Letters of Administration can be granted limiting it to a specified property in the Will and Codicil.

2. One C.Manicka Naicker executed on 31st March, 1937 a Will. He left behind his widow Kulandai Ammal and Kuppusami Naicker and Paramananda Naicker, his foster sons. By the said will, he bequeathed various items of properties to the said persons to be enjoyed during their lifetime without any power of alienation and thereafter to the heirs of the said two foster sons absolutely. But on 23rd December, 1938, he executed a Codicil at Madras and appointed Kuppuswami Naicker, one of his foster sons as executor.

3. Paramananda Naicker, one of the foster sons, filed O.P.No.233 of 1961 for probate of the latter document alone, namely, the codicil. Kuppuswami Naicker, another foster son, entered caveat whereupon the said O.P. was converted into a testamentary Original Suit No.5 of 1962. The caveator had no objection to the appellant asking for probate in respect of the original of the will with the codicil annexed and to his being appointed as Executor. The Court permitted the appellant to amend the plaint and to pay the necessary additional court fees. But, as the appellant-plaintiff did not amend the plaint, the suit was ultimately dismissed on the ground that the grant of probate of the codicil alone is not maintainable.

4. The appellant has now filed a petition under sections 225 and 276 of the Indian Succession Act, 1925 for the grant of Letters of Administration with the will and codicil attached, limiting it to the property mentioned in the codicil, which is house No.42 Ramakrishna Mutt Road, Mylapore, Madras. The office raised an objection that the appellant cannot maintain this application in view of the fact that the relief was negatived by an earlier order of this Court in T.O.S.No.5 of 1962. The matter was posted before the learned single Judge, who agreed with the office note but (sic) directed the appellant to amend the application appropriately if he chooses to prosecute the matter further.

5. Learned counsel for the appellant,

Mr.Balasubramaniam, contended that under Section 225 of the Indian Succession Act, Letters of Administration can be granted to a particular property subject to certain exceptions. Our attention was invited to the ruling in *Ramachandra Gowder v. Nanjappa*, (1973)1 M.L.J.189= 85 L.W.727= A.I.R.1973 Mad.179. That was a case where most of the estate of the deceased was administered without obtaining a probate. Under such circumstances, a Division Bench of this Court held that Letters of Administration can be granted for the property in respect of which administration is not completed. It is well-settled that an application for Probate or Letters of Administration must ordinarily be with reference to the will and the whole of the Estate, but where the case requires an exception to be made, then the Letters of Administration or Probate may be granted subject to such an exception.

6. In this case, it should be noted that the original will was executed at Chingleput. No executor was appointed under the will. The codicil was executed at Madras appointing an executor, who is now no more. The appellant is one of the beneficiaries, who has to enjoy the property during his lifetime without any power of alienation. It is now pointed out by the learned counsel for the appellant that most of the properties except the one covered by codicil had been dealt with by alienation and otherwise by both the appellant and the other beneficiaries and what remains is the property covered by the codicil in respect of which the Letters of Administration are now sought for.

7. The learned counsel for the appellant submits that on the basis of section 57(b) of the Act, the petition has to be numbered. But, we are not adverting to this subject of the case since we decide on the facts of the present case that exception has been made out for the purpose of invoking section 255 of the Indian Succession Act.

8. As most of the estate of the deceased had been alienated and since the other foster son by name Kuppuswami Naicker is dead, and as the property has to be administered, we are of the view that the appeal should be allowed. Accordingly, the appeal is allowed, the order of the learned single Judge is set aside and we direct the office to take the petition on file it otherwise found in order. No costs.

----- *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *David Annoussamy, J.*

*S.A.No.618 of 1979. 10th *August*, 1984.

Vittabai Ammal *Appellant**

v.

S.Radhakrishnan and others *Respondents.*

Torts - Death due to electric shock in a shop - Premises in possession of tenant - Wiring system done by the owner - Held that the owner was liable.

A girl M while standing near a shop to purchase cigaratees for her father, came into contact with the cross irion-bar attached to the zinc-sun-shade in front of the shop and received a heavy electric shock as a result of whch she died. In an action for damages against him the owner of the building urged that he was not liable in any manner since the premises were in the possession of the tenant. Relying on the old

principle of English law that persons visiting the demised premises after the lessee had entered into possession cannot hold the lessor liable for injuries even from existing defects the lessor denied liability.

Held:- That the proposition of law would apply only in the cases where the owner of the building has no obligation to keep the building in safe condition. In the case on hand the accident resulted out of an electric shock. The entire wiring system was done by the owner. He was responsible for its maintenance in good condition. It was clear that the accident was from a fault in electric connection leading to the shop different to the one leased out to another tenant of the owner. *[Para.5]*

Case referred to:-

Lane v. Cox, (1897)1 Q.B.415.

N.Sivamani, N.Krishna Mitra and S.C.Krishnamoorthy, for Appellant.

K.Sengottain, for Respondents 1 and 2.

M.V.Gopalaratnam, for Respondent No.3

S.K.Rajavelu, for Respondent No.4.

The Court delivered the following

JUDGMENT:- The facts of the case are summarily as follows:- On 23rd August, 1971 at about 9.15 A.M. one girl by name Mala, aged about 10 years, daughter of the plaintiffs herein, while standing near the shop of the second defendant to purchase cigarates for her father, came into contact with the cross iron bar attached to the zinc-sun-shade in front of the said shop and received a heavy electric shock as a result of which, she died on the way to General Hospital. The first defendant is the owner of the premises including the three shops in front of the premises. The second defendant is a tenant under the first defendant of one of the shops and is doing business in betel nut, cigarettes etc. The plaintiffs instituted this suit against both the defendants for having them declared to be jointly and severally liable to pay an amount of Rs.5,000/- for the damages caused to them on account of the death of their child. Both the defendants contended that the death was not due to the electric shock from the cross iron bar, but from some other source. Upon perusing the evidence produced by the plaintiffs as well as the defendants and also after hearing the independent witnesses viz., the experts from the Electricity Department, the trial court came to the conclusion that the death was caused by the leakage of electricity in the cross iron bar and found that the accused defendant as well as the third defendant viz., the Tamil Nadu Electricity Board, were not liable and ordered the first defendant to pay an amount of Rs.5,000/- to the plaintiffs, by judgment dated 4th December, 1975.

2. No appeal was filed by the plaintiffs against the decree exenorating completely defendants 2 and 3. Appeal was filed by the defendant No.1. The lower appellate Court by judgment dated 3rd December, 1977 concurred with the findings and reasoning of the trial Court and dismissed the appeal. It is against that judgment that the present appeal is preferred.

3. The only point urged before me by the appellant is that he, as the owner of the building, is not liable in any manner for the accident occurred when the premises were in the possession of the tenant. For this proposition, he relied mainly on the principle applied in the English Case *Lane v. Cox*, (1897)1 Q.B.415. The proposition of law emerging out of that case is that persons visiting the demised premises after the lessee had entered into possession cannot hold the lessor liable for injuries even from existing defects and they have to look to the lessee for any relief because it is he who was in entire custody of the building.

4. The basic principle in matters

of torts is that there should be a direct link between the tort caused and the person held liable. In the case *Lane v. Cox*, (1897)1 Q.B.415, the landlord who lets an unfurnished house in a dangerous condition, he being under no obligation to keep it in repair, is not liable to his tenant, or to a person using the premises, for personal injuries happening during the term and due to the defective state of the house. This decision dated 19th December, 1896 is based on the contract between the lessor and the lessee as per which the lessor has no obligation to keep the building in good condition. Thus if the lessee has undertaken the responsibility to keep himself the building in safe condition, he is obviously alone responsible for any damages caused to the visitor. But, the fixation of liability as in the case of *Lane v. Cox*, (1897)1 Q.B.415 would apply only if it is the respective obligations of the lessor and lessee to keep in condition the premises is the same, that is to say, when the obligation to keep the building in safe condition lies on the shoulders of the lessee.

5. This has been also clearly explained in the book "the Law of Torts" by S.Ramaswamy Iyer, 6th Edition, 1965, page 383, which has been produced before me by the appellant herself. In para 21, under the head "Negligence - Particular cases", the learned author after setting out the principle in *Lane v. Cox*, (1897)1 Q.B.415 proceeds to say that this would be the ordinary rule, but that there may be exceptional cases where the lessor is liable. The first set of exceptions would be when the lessor has entered into covenant to repair and his failure to perform it, results in bodily harm to the persons using the premises. Then the learned author proceeds with the following sentences.

> "The cases in England which deny the lessor's liability in such a case, proceed on the now exploded doctrine of privity and have ceased to have any authority now. They have now become obsolete in England - and it is suggested also in India - after the 'Occupiers' Law Act, 1937 (section 4(1), which casts on the landlord of premises the same duty of care to persons lawfully in the premises as if he had invited or permitted them to use the premises in respect of dangers created by his failure to perform the terms of the contract with his tenant for the maintenances or repair on his premises."

Therefore, the proposition of law contained in *Lane v. Cox*, (1897)1 Q.B. 415 is not of universal application. It would apply only in cases where the owner of the building has no obligation to keep the building in safe condition. The appellant has not shown that it was in this case. The accident resulted out of an electric current shock. The entire wiring system was so done by the appellant owner. He was responsible for its maintenance in good condition. After the accident, it is to her that the Assistant Engineer addressed a notice directing her to proceed with the entire re-wiring system in her premises, under Exhibit B-3. As per Exhibit B-2, namely the report of the Electrical Accident, the cause of the accident is shown to be as follows:-

> "Due to leakage of current in the premises, the casuality who came in contact with cross iron bar in the betel net shop, received heavy shock."

Giving further details, the Assistant Engingeer, Tamil Nadu Electricity Board, in Exhibit B-4 explained as follows:

> "On further investigation it was found that zinc sun shade in front of the shop has become live due to contact with live terminals of circuit wire loading to the tube light of the shop owned by another tenant Thiru Munivel of the same premises."

It is therefore clear that it is from a fault in electric connection leading to the shop different to the one leased out to defendant No.2 that the leakage happened. Therefore, the defendant No.2, that is to say, the lessee was in no

manner concerned in this accident and the entirety of the responsibility falls on the owner, who was solely in charge of the electric system in the premises. It is thus found that the proposition of law relied upon by the appellant has no application whatsoever to the facts of this case.

In the result, the appeal fails and it is dismissed with costs. Costs only to the plaintiffs.

----- *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *G.Maheswaran, J.*

*S.A.No.1939 of 1979 and Cross objections. *19th October,* 1984.

P.Ramaswamy *Appellant**

v.

Sri-la-Sri Somasundara Sri Gnanasambanda Desika Pramacharia Swamigal, Adheena-Kartha. , Madurai Adheenam *Respondent.*

and

Sri-la-Sri Somasundara Sri Gnansambanda Desika Paramacharya Swamigal, Adheena-kartha, Madurai Adheenam *Cross objector.*

v.

P.Ramaswamy *Respondent.*

(A) Hindu Religious Endowment - Mutt properties - Powers of alienation by the Head of the mutt - Perpetual lease granted by him - Not binding on the successor Madathipathi unless the lease is for legal necessity on for the benefit of the estate of the mutt.

A Madathipathi as the Head of a Mutt has not got un unqualified power of alienation in respect of the Mutt properties. It is clear that unless it is shown that a permanent lease was entered into for legal necessity or for the benefit of the estate of the mutt, the said lease cannot be binding on the succeeding Madathipathi. The burden of establishing the circumstances justifying an alienation of the suit property is on the alienee. *[Paras.6 & 7]*

(B) Civil Procedure Code (V of 1908), section 2(12) - Mesne profits - Profits arising out of improvements effected by a permanent lessee are not mesne profits.

A reading of section 2(12), Civil Procedure Code, shows that mesne profits shall not include profits due to improvements made by a person in wrongful possession. In the instant case S was a permanent lessee and his rights were transferred to the defendant's father and the defendant was said to have got the property in a partition effected in his family. The possession of the suit property by the defendant is therefore that of a permanent lessee. It cannot be said that a permanent lessee is a person in wrongful possession during the lifetime of the Madathipathi who granted the permanent lease. It should also be noted here that when the lease was granted, the suit property was a barren land not brought under cultivation. The coconut trees and mango trees were planted by the permanent lessee and the defendant's father. Therefore, any profits which accrued from the usufructs of these trees are not mesne profits. *[Para.10]*

Cases referred to:-

Maharanee Shibessouree Debia v. Mothoora Nath Acharia, (1869-70)13 M.I.A.270 (P.C.); *Prosunno Kumari Debya v. Golab*

Chand Baboo, (1875) L.R.2 I.A.145; *Hanuman Pershad Panday v. Babooee Munraj Koon Werjee*, (1854-57)6 M.I.A.393; *Palaniappa Chetty v. Sreemath Devasikamony Pandarasannadhi*, (1917) I.L.R.40 Mad. 709: L.R.44 I.A.147: 33 M.L.J.1: 16 L.W.222: A.I.R.1917 P.C.33; *Daivasikhamani Ponnambala Desikar v. Periyannan Chetty*, L.R. (1936) 63 I.A.261: 71 M.L.J.105: I.L.R.59 Mad.809: A.I.R.1936 P.C.183; *Vidya Varuthi v. Balusami Ayyar*, L.R. (1921)48 I.A.302: 41 M.L.J. 346: I.L.R.44 Mad.831: A.I.R.1922 P.C.123; *Rajaram Dass Bavaji v. Bharata Dass Bavaji*, (1917)38 I.C.221; *Muthuswamiar v. Sree Sreemethanithi Swamiyar*, (1915) I.L.R.38 Mad.356: 25 M.L.J.393; *Narasimhachari v. Gopala Ayyangar*, (1905)I.L.R.28 Mad.391; *Iswar Gopal v. Pratapmal Bagaria*, 1951 S.C.J.285: 1951 S.C.R.332: 64 L.W.525: A.I.R.1951 S.C.214; *Sri-la-Sri Shanmuga Desika Gnanasambanda Pandarasannadhi v. Anandhakrishna Swaminaidu*, (1936)70 M.L.J.155: I.L.R.59 Mad.402: 43 L.W.327: A.I.R.1936 Madras 247.

R.Thiagarajan, for Appellant.

D.Peter Francis, for Respondent.

The Court delivered the following

JUDGMENT:- The defendant is the appellant. The suit out of which this second appeal is preferred was filed by the Adheenakarthar of the Madurai Adheenam for a declaration that the perpetual lease dated 29.1.1916 does not bind the plaintiff-Mutt and for possession of suit items 1 and 2 and for profits, past and future. The plaintiff-Mutt is a religious trust. The then Pandarasannathigal Sri-la-Sri Thirugnanasambanda Swamigal granted a perpetual lease on 29.1.1916 in respect of item No.1 to one Sadasivam Pillai after receiving a premium of Rs.650/-. The lease amount payable is Rs.12/- per annum. The perpetual lease by the then Pandarasannadhigal, according to the plaintiff, will be valid only during the tenure of office of the said Pandarasannadhigal who granted the lease and cannot enure beyond his lifetime. Item No.2 which is Survey No.266/2 is an annexure and addition to plaint item No.1. The heirs of Sadasivam Pillai transferred the perpetual lease on 6.9.1937 to Periakaruppa Nadar, father of the defendant. The said Periakaruppa Nadar raised a coconut tope in Survey No.266/2, which is a poramboke land, after obtaining licence from the revenue authorities. The defendant wrote a letter to the plaintiff informing him that Survey No.266/1 (2 acres 86 cents) has fallen to his share in a partition. Thereupon, the Madathipathi who succeeded the grantor of the lease (hereinafter referred to as plaintiff) issued a notice asking the defendant to surrender possession and as the defendant repudiated the claim of the plaintiff, the plaintiff had to file the suit.

2. The suit was resisted by the defendant who in his answer contended that item 1 is a waste land and heavy sums had to be invested for reclamation and therefore a perpetual lease was granted by the Pandarasannadhigal and that the transaction was a verv prudent transaction and was in the interest of the mutt. His further contention is that Sadasivam Pillai invested a heavy amount in reclaiming the entire area and the defendant's father obtained the rights from the legal representatives of Sadasivam Pillai and he has improved upon the property. He also contended that his rights over item No.2 is that of a licensee and the Mutt cannot claim it and that the suit is bad for non-joinder of Government as a party in so far as item No.2 is concerned. It is also stated that the plaintiff himself has received the rents and the acceptance of the rent amounts to an election to affirm the permanent lease made by his predecessor and he is estopped from questioning the transaction. It is further contended that the suit is barred by the law of limitation and that in any event the plaintiff is bound to pay the value of improvements.

3. The Subordinate Judge who is also a trainee District Judge, dismissed the suit of the plaintiff holding that the act of the previous Madathipathi is granting a permanent lease was a

prudent act. The appellate Judge held that the lease is not valid beyond the lifetime of the grantor and allowed the appeal in part decreeing the suit for recovery of item No.1, but dismissed the suit in respect of item No.2 holding that the appellant is not entitled to item No.2. The defendant has preferred the second appeal against the decree to the tenant to which the claim of the plaintiff was allowed. The plaintiff has filed the memorandum of Cross-objections.

4. A learned Judge of this Court while admitting the second appeal formulated the following substantial questions of law:-

1. Whether an alienation of a Mutt property by a Madathipathi out of prudence for the benefit of the Mutt could be challenged by the successor when the latter had accepted rents from the alienee or persons claiming under him, both as an agent of the previous Madathipathi and as his successor?

2. When a transaction more than 50 years old is sought to be challenged, long after those who could speak about it had passed away, will not the presumption of law laid down in 64 L.W.525 be available to the transaction?

3. Whether the profits arising out of improvements effected by a permananent lessee be "mesne profits" within the meaning of section 2(12) of the Code of Civil Procedure?

5. The plaintiff-Mutt is a religious endowment which propagates the doctrine of Saiva Sidhantha. The then Pandarasannadhigal, Sri-la-Sri Thirugnanasambanda Swamigal, granted a lease in perpetuity in favour of one Sadasivam Pillai on 29.1.1916 evidenced by Exhibit A-2 in respect of plaint item No.1. The said Sadasivam Pillai paid a permium of Rs.650/- and agreed to pay a rent of Rs.12/- per annum. The grantor attained samadhi on 7.1.1957 and the plaintiff became the head of the Mutt. The second item of the plaint property is a river poramboke covered by Survey No.266/2. It forms an adjunct or an addition to the first item. That is also claimed by the plaintiff. The claim of the plaintiff is based on the fact that the lease in perpetuity is valid only during the lifetime of the Pandarasannadhigal who granted it and it does not enure beyond his lifetime. The defendant resisted the suit mainly on the ground that the lease granted was a prudent act on the part of the grantor and that therefore the lease is valid and binding on the plaintiff. Exhibit A-2 appears to be a counter lease deed. The lease deed executed on behalf of the Mutt is not before the Court. Sadasivam Pillai, the lessee, is not before the Court. Sadasivam Pillai, the lessee, the states in deed, Exhibit A-2, that the land is a barren land which is not brought under cultivation, that he is prepared to pay a sum of Rs.12/- per annum and that he will raise trees (as he likes) on the land. A further reading of Exhibit A-2 shows that a sum of Rs.650/- has been received by the Pandarasannadhigal on 27.1.1916 as premium. The written statement states that the lease granted by the Late Madathipathi to Sadasivam Pillai was a very prudent transaction and was in the interest of the Mutt and it cannot be questioned at this distance of time. It is not disputed that item No.1 of the suit properties was leased out to Sadasivam Pillai and there is no dispute either that the property belongs to the Mutt.

6. A Madathipathi or the Head of a Mutt has not got an unqualified power of alienation in respect of Mutt properties. The earliest of the decisions is in *MAHARANEE SHIBESSOUREE DEBIA v. MOTHOORA NATH ACHARIO*, (1869-70)13 Moo. Ind.App.270 (P.C.). Their Lordships of the Judicial Committee held that a permanent lease of land belonging to a religious endowment created by a shebait with a fixed rent for all times though adequate at the time when the lease was created was not one which could be created by him, but such a lease might be assumed to be one binding on the deity if it was otherwise conformable to any established usage. In *PROSUNNO KUMARI DEBYA v. GOLAB CHAND*

BABOO, (1875) L.R.2 I.A.145 the Privy Council took the view that the authority of the shebait of an idol's estate with regard to alienation of the said estate was analoguous to that of a guardian of an infant heir. Lord Justice Knight Bruce in *HANUMAN PERSHAD PANDAY* : *v.* *BABOOEE MUNRAJ KOON WERJEE*, (1854-57)6 Moo.Ind.App.393 observed:

"The power of the manager for an infant heir to charge an estate not his won is under the Hindu Law, a limited and qualified power. It can only be exercised rightly in a case of need or for the benefit of the estate. But where, in the particular instance the charge is one that a prudent owner would make in order to benefit the estate, the *bona fide* lender is not affected by the precedent mis-management of the estate. The actual preasure on the estate, the danger to be averted or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded".

In *PALANIAPPA CHETTY v. SREENATH DEVASI-KAMONY PANDARASANNADHI*, (1917) I.L.R.40 Mad.709 (P.C.): 44 I.A.147= 33 M.L.J.1= 16 L.W.222= A.I.R.1917 P.C.33 their Lordships of the Judicial Committee had to consider the power of a shebait to grant a permanent lease of endowed property. That was a case where certain properties had been endowed to Sri Subramaniaswamy Devasthanam in the village of Kunnakudi in the district of Madurai for the purpose of religious service to the temple. That property included a building site situate in one of the streets of the village upon which site stood some ruins. No rent was received out of that site and the ruins upon the site became a nuisance, and it was found that it would have cost more than Rs.200/- to have had the site walled around. In that state of things, one Palaniappa Chetty applied for grant of a perpetual cowle for the site at the rent of Rs.1-8-0 per annum for the purpose of erecting thereon buildings for an Annathanam Mutt. There were other offers for acquisition of the site. They were considered by the existing shebait and he granted a perpetual cowle to the appellants in that case, namely, Palaniappa Chetty and another, for the purpose of erecting buidlings thereon for the said Annathanam Matam Charity. The charity contemplated was the erection of a rest house for pilgrims passing through the village, irrespective of the fact from where they came and to which place they were proceeding and irrespective of the fact whether or not they worship in the temple and was therefore a charity not in any sense subsidiary to or connected with the temple or religious services performed therein, but separate and independent charity of a wholly different kind and character to the support or maintenance of which none of the dedicated property or its produce could as an act of charity be legitimately applied. In their Lordships opinion the evidence adduced in that case did not establish that the shebait was constrained by any necessity to make such a lease or any benefit accrued to the estate from it. In such circumstances, it was held that the grant, at a fixed rent and on payment of a premium, of a permanent lease by the shebait of a portion of the lands dedicated to the worship of the idol of which he was a trustee, was invalid as against his successor in the shebaitship. In dealing with the question as to what amounts to benefits to the estate, their Lordships say that it is impossible to give a precise definition of it applicable to all cases and that they do not attempt to do so, but the preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation and such like things would obviously be benefits." In *DAIVASIKHAMANI PONNAMBALA DESIKAR v. PERIANNAN CHETTY*, (1936)63 I.A.261= 71 M.L.J.105= I.L.R.59 Mad.809= A.I.R. 1936 P.C.183 a permanent lease or an absolute alienation of debutter property was held to be beyond the ordinary powers of management, whether it be in the case of the head of a mutt, shebait, of a family idol, or the dharmakartha of a temple and such alienation could be justified

only by proof of necessity for the preservation of the endowment or institution. In *VIDYA VARUTHI v. BALUSAMI AYYAR*, (1921) I.L.R.44 Mad.831: (1921) 48 I.A.302= 41 M.L.J. 346= A.I.R.1922 P.C.123 it was held that except for unavoidable necessity, the head of a mutt cannot create any interest in the mutt property to enure beyond his life. In *RAJARAM DASS BAVAJI v. BHARATHA DASS BAVAJI*, (1917) 38 I.C.221 a Division Bench of this Court held that the head of a mutt can nominate his *chela* during his lifetime to succeed him on his death, but he cannot alienate the whole of the corpus of the mutt property or any portion of it, except for proper and necessary purposes. *MUTHUSAMIAR v. SREE SREEMETHANITHI SWAMIYAR*, (1915) I.L.R.38 Mad.356= 25 M.L.J.393 was a case where the head of a mutt leased the village in 1872 permanently in favour of one Mudgala Chariar who sub-leased or assigned his interest in favour of certain persons. The lessor dies in 1890 and was succeeded by Sri Sudhi Nidhi Swamiar, a person who had been managing the affairs of the mutt on behalf of his predecessor during the later years of his life. In 1889 before his predecessor's death, he, on behalf of the madathipathi, leased the inam to the 6th defendant in that case cancelling the lease of 1872. The sixth defendant was, however, not able to the.obtain possession and from 1893 onwards the Swamiar was collecting rent reserved by the old lease of 1872 and in 1903 the litigation about the sixth defendant's lease having come to an end, he treated the occupants under the old lease as tenants and recovered rent from them, according to the shares held by them in inam. In 1906 Sri Sudhi Nidhi Swamiar died and was succeeded by the plaintiff in that case. He sued to set aside the lease and recover possession of the inam. The Subordinate Judge directed the defendant to deliver possession of the suit land. The fourth defendant who was in possession of the three-fourths of the plaintiff's share in the said village which was sold for arrears of Road Cess due under the Local Boards Act appealed. It was contended that the suit is barred by limitation, because time has to run from the date of alienation in 1872, the lease being void, or at the latest from the death of Sugnana Nandhi Swamiar in 1890. It is conceded in that case for the appellants that the lease is in excess of the powers of the madathipathi. It was held in that case that the suit is not barred by limitation except as regards the lands sold in revenue sale, that the alienation by the head of the mutt is not necessarily void and has no effect, but is good for the lifetime of the alienor. In *NARASIMHACHARI v. GOPALA AYYANGAR*, (1905) I.L.R.28 Mad. 391, a Division Bench of this Court held that a trustee of a religious endowment cannot, except on special grounds create a perpetual tenure binding on his successors in office.

7. It is clear therefore from the above rulings that unless it is shown that a permanent lease was entered into for legal necessity or for the benefit of the estate of the mutt, the said lease cannot be binding on the succeeding madathipathi. The burden of establishing the circumstances justifying an alienation of the mutt property is on the alienee. It is stated in the written statement that item No.1 was a dry land, almost a waste, overgrown with shrubs and prickly pears and that the position was that the land was only a source of liability for tax with no prospect of any appreciable income, that at that time the Mutt could not command necessary finance to reclaim the area and in the circumstances disposal of the land cannot be said to be void and beyond the powers of the head of the mutt and that the cowle given by the late Madathipathi to Sadasivam Pillai was a very prudent transaction and was in the interest of the Mutt. The written statement states that the permanent lease came into existence as the land in question was a dry land and is not cultivable and it abuts river Vaigai and the Mutt could not spend for reclaiming the property and in the circumstances disposal of the land cannot be said to be void or beyond the powers of the Mutt. It is also seen from the statement that

the lease in perpetuity created in that period could not be considered to be an imprudent transaction or one not in the interest of the Mutt. Exhibit A-2 which is in the form of a letter is said to be a counter-lease deed executed by Sadasivam Pillai in favour of the late Madathipathi Sri-la-Sri Thirugnanasambanda Pandarasannadhigal. On the 29th January, 1916, Sadasivam Pillai applied to the then Madathipathi for grant of a perpetual lease of the property described in Exhibit A-2 on a rent of Rs.12/- per annum for the purpose of raising trees of his own choice. The perpetual lease was granted to Sadasivam Pillai in consideration of a premium of Rs.650/- which has already been paid to the Madathipathi on 27.1.1916. A perusal of Exhibit A-2, shows that no circumstance is mentioned justifying an alienation of the Mutt property. There appears to be no legal necessity. The written statement is to the effect that disposal of the land cannot be said to be void or beyond the powers of the head of the Mutt. But the several rulings pointed out above clearly show that a mahant, madathipathi of the head of a Mutt has no such absolute and unrestricted power to alienate the immovable property and such alienation could be justified only on legal necessity or for the benefit of the estate of the Mutt. It is pointed out by the learned counsel appearing for the appellate that the appellate Judge has found that the Mutt was not in affluent circumstances on the date of Exhibit A-2 and that it has been borrowing small sums for expenses and has been raising loans on promissory notes, as could be gathered from the entries in the ledgers, Exhibits A-9 to A-12. But then the mere fact that the Mutt was not in affluent circumstances would not necessarily justify the madathipathi to alienate part of the Mutt property when it is not shown that such alienation was for the benefit of the estate of the Mutt. There is nothing in the evidence to establish that the Madathipathi was constrained by any necessity to grant this perpetual lease or that any benefit accrued to the estate by this permanent cowle. There is no evidence whether any attempt was made to reclaim the property. From Exhibit A-2 it is seen that it was Sadasivam Pillai who took the initiative in the matter and applied to the Madathipathi for grant of a perpetual cowle for the purpose of planting trees of his choice. The only ground stated in Exhibit A-2 is that the property granted in perpetual lease was not brought under cultivation for a long time and it is not fit for cultivation and is overgrown with cactus. Beyond this, no reasons are furnished in Exhibit A-2 for the grant of the perpetual lease. There is no evidence let in by the appellant to show that there was any pressure on the estate of the Mutt which necessitated the execution of the lease deed, Exhibit-2, in favour of Sadasivam Pillai. It is also not shown whether there was any need for giving away the land on a fixed rent when the lessor has the power to vary the rate of rent on a future date depending on the prevailing circumstances. It is seen from the evidence placed before Court that a coconut grove has came into existence on the suit property and it has given a good yield of coconuts. It is stated that some reclamation was done by the alienee, but it is clear that the land in question is a valuable land and the situation of it on the banks of a river far from endangering the property from being flooded, will actually help the yield of coconuts which require abundant and copious supply of water. From the foregoing, it is clear that the permanent lease evidenced by Exhibit A-2 was not entered into for any legal necessity or for the benefit of the estate of the Mutt.

8. It is next contended that the plaintiff had accepted rent from the alienee or from the persons claiming under him both as an agent of the Madathipathi who died and as his successor and therefore the alienation could not be challenged. Generally, a permanent lease granted by the head of a mutt is valid only during his life-time. In *VIDYA VARUTHI v. BALUSAMI AYYAR*, (1921) I.L.R.44 Mad.831= 41

M.L.J.346 the Privy Council pointed out that "according to the well-settled law of India (apart from the question of necessity), a mahant is incompetent to create any interest in respect of the mutt property to enure beyond his life. In *MUTHUSAMIAR v. SREEMETHANITHI SWAMIYAR*, I.L.R.38 (1915) Mad.356= 25 M.L.J.393, a Division Bench of this Court was of the opinion that an alienation by the head of a Mutt is not necessarily void and of no effect, but is good for the lifetime of the alienor. In *NARASIMHACHARI v. GOPALA AYYANGAR*, (1905) I.L.R.28 Mad.391 a Division Bench of this Court took the view that a trustee of a religious endowment cannot, except on special grounds, create a perpetual lease, unless it is for legal necessity or for the benefit of the estate of the Mutt, and will not bind the successor in office. It has been found that the perpetual lease created by the late Madathipathi was not for legal necessity or for purposes binding the estate. Therefore, such an alienation will not bind the plaintiff, the succeeding Madathipathi. But the counsel for the respondent pointed out that the plaintiff has received rents. On this aspect, we have the evidence of the defendant who says that he has paid rents under Exhibits B-2 to B-5 through his agent to the Mutt. Of these, Exhibits B-2 to B-4 were given by the late Madathipathi. Exhibit B-5 is a receipt of the date 10.8.1957. It is signed by one Sri Gnanasambanda Desikar. In the written statement, the defendant pointed out that the plaintiff has received rents from Fasli 1363 to Fasli 1366. There is no proof for that. The only receipt, Exhibit B-5, is of the date 10.8.1957. P.W.1 was not confronted with this receipt. There is no admission by P.W.1 that Exhibit B-5 was granted by the plaintiff. All that he says is that Exhibits B-2 to B-5 were given by the plaintiff. It is not clear whether money was paid through the agent of the defendant or whether the receipt was sent through his agent. There is no clinching proof that this receipt, Exhibit B-5, is given by the plaintiff. Assuming that it is given by the plaintiff, it is not clear as to how a solitary receipt granted to the defendant would estop the plaintiff from challenging the alienation of a perpetual lease made by his predecessor, more particularly when the defendant himself has pleaded in his written statement that money orders sent by him towards rent were "improperly refused" by the plaintiff. The plaintiff has not accepted the rents sent by the defendant and therefore he had no intention that the lease should enure beyond the lifetime of his predecessor or to create a new tenancy. On 25.7.1955 under Exhibit A-5, the defendant writing to the plaintiff-mutt says that the suit properties have fallen to his share, obviously in a partition, and that he will be paying the rent of Rs.12/- per annum. But on 5.9.1957, the Mutt issues a notice through its Advocate requiring the defendant to surrender possession of the property on the ground that the previous Madathipathi had no right to grant a permanent lease. It is clearly stated in that notice that the lease which is for nominal sum is without any benefit or necessity and therefore void. The defendant replies through his Advocate under Exhibit A-7 dated 17.10.1957. Therefore, it is wrong to say that the plaintiff accepted the rents from Fasli 1363 to Fasli 1366 and even assuming that Exhibit B-5 is a receipt granted by the plaintiff solitary receipt for payment of Rs.12/- will not estop the plaintiff from challenging the alienation made by the predecessor which does not enure beyond his lifetime as it is found to be not for any legal necessity or for the benefit of the estate.

9. It is next contended by the learned counsel appearing for the appellant that Exhibit A-2 remained unquestioned for more than half a centur and that by itself is sufficient to support the conclusion that the grant was made for legal necessity and is binding on the mutt. In support of his contention, learned counsel for the appellant invited my attention to *ISWAR GOPAL*

v. PRATAPMAL BAGARIA, 1951 S.C.J.285= 1951 S.C.R.332= 64 L.W.525= A.I.R.1951 S.C.214. That was also a case where the validity of a permanent lease granted by a shebait was called into question. The Supreme Court found as a fact that the "transaction was in the best interest of the deity and was clearly beneficial to it." It was also observed that "it is difficult to believe that a devout person like her (a shebait) who was not only a shebait but also the widow of the founder of the deity and who had shown such keen interest for the upkeep of the worship of the deity should have entered into the transaction in question unless she considered it absolutely necessary to do so." It was also found that there were several shebaits between the death of Muni Bibi who was the widow of the founder of the deity and who created the permanent lease and the commencement of the litigation in that suit and that the lease was never impugned as beyond the powers of the shebait. But, on the other hand, the permanent character of the lease was recognised in the deeds subsequently. It was also found that the tenancies were created by two pious ladies who were keenly interested in the upkeep of the worship of the deity and it was suggested that they are expected to derive no personal advantage from the transactions in question. It is in those circumstances that the Supreme Court held that if a permanent lease granted by a shebait is called in question, although it is not possible to ascertain fully what the circumstances were in which it was made, the Courts should assume that the grant was made for necessity so as to be valid beyond the life of the grantor. Here, in this case it has been found that the perpetual lease was not for legal necessity or for benefit of the estate of the Mutt. Secondly, even the recitals in Exhibit A-2 do not show that there was any legal necessity or benefit to the estate which impelled the late Madathipathi to execute Exhibit A-2. Thirdly, the plaintiff within a period of nine months of his assuming office, has chellenged the alienation by issuing a notice through his Advocate on 5.9.1957 unlike in the case referred to where several shebaits who succeeded the alienor have not challenged the premanent lease. Forthly, the madathipathi who granted the permanent lease in 1916 died only in the year 1957 and it is only after his death and not during his lifetime the permanent cowle or lease could be challenged. The plaintiff has filed the suit within 12 years from the date of assuming office. The suit is well within time and the issue on the question of limitation was not pressed in the lower court. It cannot therefore be said that in this case a presumption would arise that the grant of permanent lease was made for legal necessity and for the benefit of the estate so as to bind the Mutt after the lifetime of the Madathipathi who granted it.

10. The next contention of the learned counsel for the appellant is that the profits realised out of the improvements made by the lessee cannot be termed as mesne profits. Section 2(12) of the Code of Civil Procedure runs thus:-

> " 'mesne profits' of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profit, but shall not include profit due to improvements made by the person in wrongful possession."

A reading of that section shows that mesne profits shall not include profits due to improvements made a person in wrongful possession. Sadasivam Pillai was a permanent lessee and his rights were transferred to the defendant's father and the defendant is said to have got the property in a partition effected in his family. The possession of the suit property by the defendant is therefore that of a permanent lessee. It cannot be said that a permanent lessee is a person in wrongful possession during the lifetime of the Madathipathi who granted the permanent lease. Further it should also be noted here that when the lease was granted under

Exhibit A-2, the suit property was a barren land not brought under cultivation as is evident from the recitals in Exhibit A-2. The coconut trees and mango trees have been planted by the permanent lessee and by the defendant's father. Therefore, any profit which accrued from the usufructs of these trees are not mesne profits and consequently the decree granted to the plaintiff against the defendant for Rs.4162.50 towards past mesne profits, is wrong. That disposes of the substantial questions of law raised.

11. As regards improvements, the appellate Court has found that the defendant is not entitled to value of improvements of the property belonging to the Mutt following the ruling in *SRI-LA-SRI SHANMUGA DESIKA GNANASAMBANDA PANDARASANNADHI v. ANANDHAKRISHNA SWAMINAIDU*, (1936) 70 M.L.J.155= I.L.R.59 Mad.402= 43 L.W.327= A.I.R.1936 Mad.247. No ground expressly has been taken in the memorandum of grounds of appeal challenging this finding of the appellate Court though in ground No.22, a reference is made to the reclamation by the lessee and by his successors. There is no other contest in this second appeal.

12. In the Cross-objections, the plaintiff attacks the decree of the appellate Court dismissing the suit in respect of item No.2. According to the plaintiff, the lower appellate Court ought to have decreed the suit for possession in regard to item No.2 also. The further contention is that the lower appellate Court ought to have granted past profits at the rate claimed by the Cross-objector. It has already been found that the plaintiff will not be entitled to past mesne profits. As regards item No.2, the lower appellate Court has clearly found that the original lessee, Sadasivam Pillai, has encroached upon item No.2 and planted trees and after his death, his heirs sold it to respondent's father along with item No.1. It is also pointed out that under Exhibit A-6 issued by the plaintiff, item No.2 has not been reclaimed. The defendant nas offered to pay rent only in respect of item No.1. It is also found that there is no proof that item No.2 was an accretion to item No.1. There is no proof that item 2 belongs to the plaintiff-Mutt. The suit was rightly dismissed in respect of item No.2.

13. The result is the decree granting past mesne profits of Rs.4162.50 alone is set aside and in other respects the decree of the first appellate Court is confirmed. The second appeal is allowed to that extent and is dismissed in other respects. The Cross-objections is dismissed without costs. The parties will bear their own costs in the second appeal.

---- *Second appeal partially allowed.*
Cross objections dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *S.Mohan, J.*

*W.P.No.3167 of 1984. *7th August,* 1984.

Mrs. S.Sivanarul *Petitioner**

v.

The State of Tamil Nadu rep. by the Secy. Dept. of Education, Madras-9 and others *Respondents.*

(A) Tamil Nadu Code of Regulations for Matriculation teachers - School Teacher dismissed on the ground of her marriage - Resolution of Governing Body of School - Order set aside - Termination of service not only obnoxious but also opposed to public policy.

(B) Constitution of India (1950), Article 226 - School Teacher dismissed from service on the ground of her marriage - Writ petition against termination - Objection on the ground that it is a private school - Maintainability.

(C) Constitution of India (1950), Articles 13, 14, 16, 21 and 226 - Applicability.

Held:- The termination of services of the petitioner in this case purely on the ground that she got married is not only obnoxious but also opposed to public policy. *[Para.19]*

Where by reason of recognition by the Government, the school imparting education gets the advantage of admission from the general public it cannot be stated that it is purely private and therefore no writ will lie. The recognition accorded by the Government is an important point to be borne in mind, as that enables the school to gain certain advantages, the parents can also expect that their children, who undergo study in the school will not be left in the lurch, if a transfer or promotion to some other school is sought. The fact that the school obtains aid from the Government or teaching grant from the Government also makes the position clear. If from and out of the tax-payers money grants or aids are given, can the school say that it is a private management and therefore it is not amenable to writ jurisdiction? Thus, the writ petition is maintainable. *[Para.15]*

It is true that the Writ Court can negative the relief if the matter falls within the realm of contract, if it requires evidence, but here no such evidence is required. In this case it seems to be a matter of practice to obtain the letters of re-employment at the end of every academic year. That is also reflected in the resolution (a) of the Governing Body of the School of 3-6-1981. Therefore, it has to be concluded that the writ petitioner cannot be denied the relief on the ground that the parties are bound by the terms of the contract. *[Para.16]*

Cases referred to:-

P.M.John v. A.L.Pande, (1965)2 S.C.R. 725; *Harijander Singh v. Kakatiya Medical College,* I.L.R. (1974) A.P.1063: A.I.R.1975 A.P.35; *C.I.I.College v. Chandra Mohan,* A.I.R.1971 All.93; *V.A.Baid v. Union of India,* A.I.R.1976 Delhi 302; *C.B.Muthamma v. Union of India,* (1979) Lab.I.C.1307: (1979) S.L.J.654: (1979)4 S.C.C.260: A.I.R.1979 S.C.1868; *Cleveland Board of Education v. La Flour,* 39 Lawyers Edn.32; *Turner v. Department of Employment Security,* 46 Lawyers Edn.182; *Harvinder Kaur v. Hanumandev Singh,* A.I.R.1984 Delhi 66; *Degins v. St.A.H.E. School,* (1972)1 S.C.J.129: (1972)1 M.L.J. (S.C.) 37: (1972)1 An.W.R. (S.C.) 37: A.I.R.1971 S.C.1920; *Vaish College v. Lakshmi Narain,* (1976)2 S.C.C.58: (1976) Lab.I.C.576: (1976)2 S.C.R.1006: A.I.R. 1976 S.C.888; *Hema Raju v. State of A.P.,* (1984) Crl.L.J.977: A.I.R.1983 S.C.575; *Air India v. Nergesh Noorsa,* (1981) Lab.I.C.1313: (1981)4 S.C.C.335: A.I.R.1981 S.C.1829; *Badri Narayan, In re,* A.I.R.1981 Cal.214; *Prabhakar Ramakrishna v. A.K.Pande,* (1965)2 S.C. R.713; *Cleveland Board of Education,*

Laflour Cohen v. Chesterfield County School Board, 114 U.S.632; *Begulla Bapi Raju v. The State of Andhra Pradesh*, (1984)1 S.C.C.66= A.I.R.1983 S.C.1073; *Harvinder Kaur v. Hanumandev Singh*, A.I.R.1984 Delhi 66; *Meganatha v. Smt. Susheela*, A.I.R.1957 Madras 423; *Hyde v. Hyde*, (1866) L.R.1 P.D.130.

V.R.Venkataraman, for Petitioner.

Selvaraj, Government Advocate and *M.Srinivasan*, for Respondents.

The Court made the following

ORDER:- The writ petition is for certiorarified Mandamus to call for the records relating to the impugned order, dated 30th August, 1983, passed by the third respondent, to quash the same and direct the third respondent to continue the petitioner in service.

2. The petitioner is employed as a whole-time teacher from the year 1980 under the third respondent. She completed her Bachelor degree in Tamil in April, 1980 and obtained her Master's degree in Tamil in 1983. She took her B.Ed. examination and was awaiting for the results, at the time of filing of the writ petition. It is only on the footing that she is a whole-time teacher, a certificate was issued to her to join the B.Ed. course for the academic year 1982-83. Even though the petitioner was a full-time teacher, she was made to sign a letter declaring her willingness to continue her profession as a teacher in the said school at the commencement of every academic year.

3. In her affidavit the petitioner would state that during her employment as a teacher instructing for standards IV to VIII from the year 1980, the authorities of the school wanted her to embrace Christianity, should she desire to continue as a teacher. The petitioner refused to do so. Therefore, a resignation letter was demanded of her and she was called upon to leave the school. She did not comply with this demand. She got married on 21st August, 1983. Thereupon, on 29th November, 1983, a letter dated 30th August, 1983, was served on the petitioner terminating her services. It is the validity of this letter that is questioned. Aggrieved by the same she filed O.S.No.633 of 1983, in the court of the District Munsif of Chidambaram seeking an injunction restraining the 3rd respondent from terminating her services. The petitioner was asked to report for duty everyday, but she was not permitted to take any class. On 12th March, 1984, the learned District Munsif of Chidambaram dismissed I.A.No. 2200 of 1983, in O.S.No.635 of 1983, stating that he had no jurisdiction to entertain the suit.

4. Stating that she proposes to withdraw the suit and that her fundamental right under Article 13 of the Constitution has been violated, she has come forward with this writ petition on the following among other grounds-

"(i) The order of termination states that it has come to be done only because the petitioner got married. There is no prohibition under the Code of Regulations for Matriculation Schools, in Tamil Nadu that a teacher's services, if she gets married, would stand terminated. Therefore, the order is illegal.

(ii) The management shall have the power to terminate the service of a teacher only on the grounds enumerated in section 20(B)(a) and (b) or for the violation of the Code of Conduct prescribed under Appendix VII of the Code of Regulations for Matriculation Schools in Tamil Nadu. As none of the provisions is violated, the termination on the ground of the marriage is illegal and void.

(iii) Even assuming that the marriage is a ground for termination, the order is *mala fide* because there is yet another teacher in the school, who is married. Her services had not come to be terminated because she is a

Christian by religion. Therefore, the order of termination is violative of Articles 14 and 16 of the Constitution."

(iv) Under provisions (i) to (ii) to section (B) the petitioner should be given sufficient opportunity to put forth her case and an enquiry ought to have been conducted. No such enquiry was adopted. Therefore, it is violative of the principles of natural justice.

(v) The bye-law under which the action is purported to have been taken is not sanctioned either by the Director of School Education or by the Government of Tamil Nadu. Therefore, the action of the 3rd respondent is illegal."

5. Mr.V.R.Venkataraman, learned counsel for the petitioner, submits in support of the grounds raised in the affidavit, as follows: No doubt, a contract was entered into between the petitioner and the institution, but if such a contract is opposed to public policy certainly, the court will (sic) not deny the relief merely on the ground that the matter falls within the realm of contract. First of all, if the Educational Code gives rights to the petitioner, those rights can be enforced. Then again it is not a matter for which evidence is required for the petitioner to be denied a relief under writ jurisdiction. In support of this submission *P.M.John v. A.L.Pande*, (1965)2 S.C.R. 725 is cited. Then again in *Harijander Singh v. Kakatiya Medical College*, A.I.R.1975 A.P.35= I.L.R. (1974) A.P.1063 and *G.T.I.College v. Chandra Mohan*, A.I.R.1971 All.93 it has been held that the Committee of Management of an aided educational institution will be amenable to writ jurisdiction.

6. In this case the petitioner's services have come to be terminated purely on the ground of marriage. Therefore, such a discrimination is clearly violative of Article 14 of the Constitution of India, as laid down in *V.A.Baid v. Union of India*, A.I.R.1976 Delhi and *C.B.Muthamma v. Union of India*, A.I.R.1979 S.C.1868= (1979) Lab.I.C. 1307= (1979) S.L.J.654= (1979)4 S.C.C. 260. In American Law also, such provision of termination of services of women on the ground that they became pregnant, etc., had been held to be invalid as opposed to the 14th Amendment of the American Constitution. Vide *Cleveland Board of Education v. La Flour*, 39 Lawyers Edn.32, *Turner v. Dept. of Employment Security*, 46 Lawyers Edn.182. Yet another case that was cited on behalf of the petitioner is *Haravinder Kaur v. Hanumandev Singh*, A.I.R.1984 Delhi 66 at 77.

7. Lastly, it is submitted that the petitioner alone has been singled out for hostile treatment, because the 4th respondent, though married, her services are continued. This is because she happens to be a Christian.

8. Mr.M.Srinivasan, learned counsel for the 3rd respondent school, states first and foremost that the writ petition against the school is not maintainable, because it is a private school. The Code of Regulations for Matriculation Schools does not apply, since temporary recognition for Standards I to VIII alone has been granted till 31st March, 1975.

9. Even otherwise, the parties are bound by the contract. The contract of service was for a period of one year for the academic year 1983-84. The contract was prior to the recognition and hence that would remain unaffected.

10. There is a contract of personal service. That cannot be enforced as against the school. It has been so laid down in *Degins v. St.A.H.E.School*, A.I.R.1971 S.C.1920= (1972)1 S.C.J.129= (1972)1 M.L.J. (S.C.) 37= (1972)1 An.W.R. (S.C.)37. If it is a non-statutory body, as laid in *Vaish College v. Lakshmi Narain*, (1976)2 S.C.C.58= (1976) Lab.I.C.576= (1976)2 S.C.R.1006= A.I.R.1976 S.C.888 no writ will lie. This is not a case in which even personal liberty is affected so as to enable the petitioner to invoke Article 21,

because life does not include 'livelihood'. It has been so laid down in *Hema Raju v. State of Andhra Pradesh*, (1983) Crl.L.J.977= A.I.R.1983 S.C.575, *Air India v. Nergesh Noorsa*, A.I.R.1981 S.C.1829= (1981) Lab.I.C.1313= (1981)4 S.C.C.335 and In re *Badri Narayan*, A.I.R.1981 Cal.214.

11. In view of the above arguments, the following questions emerge for consideration:

(1) Whether the writ petition is maintainable-

(a) because the third respondent school is a private institution;

(b) because the matter relates to the realm of contract?

2. If maintainable, whether the termination of the petitioner's services could be held to be legal?

12. *Question No.1:* The admitted facts in this case are, that the petitioner was employed from August, 1983, as a whole-time teacher in the third respondent school. That is evident from the following service certificate issued to her:

Service Certificate

I hereby certify that Thiru/Tmt/Selvi S.Sivanarul is employed as a wholetime teacher in Nirmala Matriculation school from August, 1980. She has the permission of the management to join the B.Ed. degree course through correspondence during the academic year 1982-83.

I further certify that the applicant has on 30th June, 1982, put in a total service of 2/two years and 5/five months as a whole-time *bona fide* teacher in recognised institutions, as stated in column No.10. Teaching Experience (State only the service put in recognised schools).

*total service in all recognised schools should be given)

School seal

Date

Signature of Headmaster/Headmistress

(Signature of the Secretary/ Correspondent.

Sd. St.Valentine Mary, Correspondent, Nirmala Matriculation School, Chidambaram.

Office Seal;

Office of the Inspector of Matriculation Schools, Madras.

13. On 4th September, 1982, by the proceedings of the Director of School Education made in Rc.No.13594/B3/82, permission was granted to the 3rd respondent to open a new Matriculation School at Chidambaram in the name of 'Nirmala Matriculation School, with standards I to VIII (English medium), under the management of the Immaculate Heart of Mary Society of Pondicherry and Tamil Nadu during 1982-83, subject to the fulfilment of the conditions specified in the annexure to those proceedings.

14. The school was required to satisfy these conditions. As many as 10 conditions were imposed. The details of the same are not necessary for our purpose. Suffice it to note that the management was called upon under clause 7 to enter into an agreement with the teacher or a member of the non-teaching staff, in the prescribed form. By proceedings, dated 3rd August, 1983, temporary recognition was accorded for standards I to VIII in Nirmala Matriculation School, Chidambaram (3rd respondent) upto the period ending 31st May, 1983. Here again, the 3rd respondent was required to create the balance of endowment of Rs.50,000 in five annual instalments, to provide adequate and suitable buildings, laboratory equipment, etc. No doubt, the 3rd respondent is a private management. On that score, could it be said that it goes out of the

purview of writ jurisdiction? I think not. On the mere fact that recognition is sought at the hands of the Government and the Government imposes several conditions as a prelude to recognition, it cannot be stated that it is in the nature of such a private authority having no public duties to perform. Suppose it were to merely import private duties, it would be a different matter. But, where, by reason of recognition by the Government, the school imparting education gets the advantage of admission from the general public, it cannot be stated that it is purely private and therefore no writ will lie. In *Prabhakar Ramakrishna Jeth v. A.K.Pande*, (1965)2 S.C.R. 713 it was held as follows:

> "The provisions of Ordinanace 20, otherwise called the "College Code" have the force of law. It confers legal rights on the teachers of the affiliated colleges and it is not a correct proposition to say that the 'College Code' merely regulates the legal relationship between the affiliated colleges and University alone. The provisions of the 'College Code' relating to the pay scale of teachers and their security of tenure properly fall within the statutory power of affiliation granted to the University under the Act."

Therefore, the College Code in that case created rights. Here Clause 7 of the conditions creates rights.

15. In *Harijander Singh v. Kakatiya Medical College*, I.L.R. (1974) A.P.1063= A.I.R.1975 A.P.35 the question arose whether a private college aided by Government and affiliated to the Osmania University would be amenable to writ jurisdiction. In Paragraphs 84 and 85 it was observed thus:

> "84. In so far as the first question is concerned it could not be disputed that the affiliation rules noted above are made in pursuance of the powers conferred on the University by section 44(3) of the University Act. The rules therefore have force of law. It cannot be said that they constitute power of management only. The rules requiring the governing body to be a registered body and that it should have on it representatives of the Government and the University and the qualifications of the teaching staff and the conditions governing their tenure of office all lend support to a tripartite contract between the governing body, the teacher and the approving authority, i.e. the University and the Government. The teachers in such colleges have status under the rules and in any case, they hold office. Apart from the express rules, the security of their tenure of office can easily be spelt out from the various provisions of the rules of the University as well as the Grant-in-aid Code of the Government. The rules relating to the pay scales of the teachers and their security of tenure properly fall within the statutory power of affiliation granted to the University under the Act. We have no manner of doubt that these rules create certain 'rights' in the teachers of the affiliated colleges. They are not mere servants of the college employed purely on contract by the managing committee of the college. They have a 'status' although they enter into a contract and in any case they hold office. We are therefore satisfied that such cases are clearly governed by the decision in *Prabhakar Ramakrishna Jeth v. A.K.Pande*, (1965)2 S.C.R.713.
>
> 85. Even otherwise, we think in an appropriate case a writ of *certiorari* can go against a private college although it is not a statutory body. The rules of affiliation, even if taken to be non-statutory but mere administrative instructions issued by the University or the Grant-in-aid Code by the Government, they would not come in the way of issuance of such a writ. We thus come to consider the second question."

In the light of the above decisions, in my considered view, the recognition accorded by the Government is an

important point to be borne in mind, as that enables the school to gain certain advantages, the parents can also expect that their children, who undergo study in the school, will not be left in lurch, if a transfer or promotion to some other school or college is sought. The fact that the 3rd respondent school obtains aid from the Government of teaching grant from the Government also makes the position clear. If from out of the tax-payers' money grants or aids are given, can the school say that it is a private management and therefore it is not amenable to writ jurisdiction? I should answer in the negative. Thus I hold the writ petition is maintainable.

16. *Contractual liability:* On 30th April, 1982, the petitioner wrote to the 3rd respondent school that she had served as a teacher for the past two years from 1980 and that she would desire to continue her job next year onwards. Similarly for the academic year 1983-84, she wrote another letter. On 27th May, 1983 she was appointed as a teacher for the academic year 1983-84. In this state of affairs, the petitioner got married on 21st August, 1983. The governing body by its proceedings dated 3rd June, 1981, had resolved as follows:

> " ... ...
> (b) The service of the teacher will be terminated with three months notice when she gets married for the following reasons-
> (a) when she takes maternity leave, the small children's education will be affected without teacher for three months;
> (ii) due to lack of funds a substitute cannot be appointed. So the class will suffer."

In exercise of the rights under the bye-law the impugned order of termination came to be passed stating that because of the marriage she was required to leave the school by 30th November, 1983. It is true that as laid down in *Regina v. St.A.H.E.School*, (1972)1 S.C.J.129= (1972)1 M.L.J. (S.C.) 37= (1972)1 An.W.R. (S.C.) 37= A.I.R.1971 S.C.1920 a contract of personal service cannot be enforced. But, if a contract entered into between the parties is opposed to public policy and the termination is on an arbitrary or whimsical ground, I should think that the Court cannot deny relief to the petitioner. No doubt, the petitioner has been entering into the contract every year. If her services had come to a termination by efflux of time, that is a different matter. But during the currency of contract, viz., 8th March, 1984, if solely on the ground that she got married and therefore her services are to be terminated that has nothing to do with the contract of service from year to year. Then again, normally the writ Courts negative the relief if the matter falls within the realm of contract, if it requires evidence, but here no such evidence is required. The facts are admitted. In this case it seems to be a matter of practice to obtain letters of re-employment at the end of every academic year. That is also reflected in the resolution (a). Therefore, I conclude the writ petitioner cannot be denied relief on the ground that the parties are bound by the terms of the contract.

19. Then comes the important question, viz., the resolution relating to marriage. I have already extracted the minutes of the meeting of the governing body, dated 3rd June, 1981. To highlight the issue let me again extract clauses (b) and (c) of resolution No.3.

> "(b) The service of the teacher will be terminated with three months notice when she gets married for the following reasons-
>
> (i) when she takes maternity leave, the small children's education will be affected without teacher for three months.
>
> (ii) due to lack of funds a substitute cannot be appointed. So, the class will suffer."

The concept of 'marriage' as viewed by Joseph Addison is as follows:-

"Marriage enlarges the scene of our

happiness and of our miseries. A marriage of love is pleasant ... of interest, easy and where both meet, happy. A happy marriage has in it all the pleasures of friendship, all the enjoyments of sense and reason, and, indeed, all the sweets of life."

George Elliot says as under:

"What greater thing is there for the human souls than to feel that they are joined for life ... to strengthen each other in all labour, to rest on each other in all sorrow, to minister to each other in all pain, to be one with each other in silent, unspeakable memories at the moment of the last parting."

No less than the father of our nation, Mahatma Gandhi, eloquently said:-

"Marriage is a natural thing in life, and to consider it derogatory in any sense is wholly wrong. The idea is to look upon marriage as a sacrament and therefore 'to lead a life of self-restraint in the married state."

To say that a teacher will lose her services on her getting married is to forget the fact that the bloom or blight of all life's happiness consists in marriage. It is nothing more than a civilised way of living. To tie it merely to sex is not only obnoxious but is untrue. No wonder Channing Pittock said:-

"Marriage is the greatest educational institution on earth."

18. What is the reason that is given in the resolution. It is stated that when a teacher takes maternity leave, the children's education will be affected and that due to lack of funds a substitute cannot be appointed. First of all this is full of assumptions; in these modern days, that one should necessarily beget a child is an assumption unwarranted. Secondly it is not mere physical union, but union between two spirits. As Frederick William Robertson said:-

"Marriage is not a union merely between two creatures .. it is a union between two spirits, and the intention of that bond is to perfect the nature of both, by supplementing their deficiencies with the force of contract, giving to each sex these excellences in which it is naturally deficient; to the one, strength of character and firmness of moral will, to the other, sympathy, meekness, tenderness, and just so solemn and glorious as those ends are for which the union was intended, just so terrible are the consequences if it be perverted and abused, for there is no earthly relationship which has so much power to ennoble and to exalt. There are two rocks in this world of ours, on which the soul must either anchor or be wrecked ... the one is God, and the other is the sex opposite."

19. In a case which arose in the Supreme Court of the United States in *Cleveland Board of Education, Laflour Cohen v. Chesterfiled County School Board*, 114 U.S.632 the question was whether mandatory maternity leave policies which require all teachers in a system to stop teaching five months before the expected birth of a child violate the teachers' right to due process. Justice Stewart held:-

"Freedom of personal choice in matters of marriage and family life is one of the liberties protected by the due process clause- overly restrictive maternity leave regulations, can constitute a heavy burden on the exercise of these protected freedoms- The due process clause-requires that such rules - not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's constitutional liberty."

The right to personal life and liberty enshrined in Article 21 of the Constitution must receive its full scope and meaning and therefore the resolution of this character would be violative of Article 21. No doubt in *Begulla Bapi Raju v. State of A.P.*, (1984)1 S.C.C.66=

A.I.R.1983 S.C.1073 at 1080 it was observed-

> "The argument that the word 'life' in Article 21 of the Constitution includes 'livelihood' has only to be stated to be rejected."

But, in the case on hand it is not livelihood, but living a civilised life. In this connection it is appropriate to quote *Harvinder Kaur v. Hanmandev Singh*, A.I.R.1984 Delhi 66, wherein it was observed as follows:-

> "Marriage is the very foundation of civil Society. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution in the maintenance of which the public is deeply interested, for it is the foundation of the family and of society without which there would be neither civilisation nor progress (*Meganatha v. Smt.Susheela*, A.I.R.1957 Mad.423, 426. Whether it is English law or the Indian Act, marriage is a voluntary union for life of one man and one woman to the exclusion of all others. (*Hyde v. Hyde*, (1866) L.R.I.P.D.130, 133 per Lord Penzance."

Thus I conclude that the termination of the services of the petitioner purely on the ground that she got married is not only obnoxious but also opposed to public policy. From this point of view, it is unnecessary to decide the question of discrimination.

20. In the result, the writ petition will stand allowed with costs. Counsel's fee Rs.300.

R.S. ---- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *G.Ramanujam and K.Shanmukham, JJ.*

*W.P.Nos.4397 of 1978 and 4430 of 1978.
11th January, 1985.

Bharathi M.Pillai *Petitioner**

v.

The State of Tamil Nadu, reptd. by the Secy. to Govt. Revenue Department, Madras-9 and others *Respondents.*

(A) Tamil Nadu Urban Land Tax Act (XII of 1966) as amended by Tamil Nadu Act (30 of 1971) 14 of 1973 and 49 of 1975, section 6-B - Constitutionality - Scope and applicability - Section 6-B runs counter to the charging section - Principle of aggregation alters the character of impost from tax on one's holding as Urban Land - Held to be ultra vires and the word aggregate is liable to be struck down.

(B) Constitution of India (1950), Article 14 and Schedule 7, List I, Entry 86, List 2, Entry 49.

(C) Pith and substance - Doctrine of - Applicability.

On Writ Petitions filed for the issue of a writ of declaration declaring the Tamil Nadu Urban Land Tax Act, 1966, as amended by the Tamil Nadu Acts 30 of 1971, 14 of 1973 and 49 of 1975 to be unconstitutional and void,

Held:- It is well established that to find out whether a particular statute comes within the legislative competence of the Legislature it is the pith and substance of the legislation that will be determinative. The pith and substance of a taxation statute has to be determined with reference to the charging section. The charging section imposes a charge only on a unit of urban land which according to the definition is a survey Number or a sub-division

number. Therefore the charge of tax under the statute falls squarely within Entry 49 of List II. However section 6-B which is a machinery provision goes beyond the charging section and levies the tax mentioned in the schedule on the total extent of urban land and not on each urban land which is taken as a unit for the purpose of tax. It is section 6-B which alters the nature of the tax and converts the tax as one of the aggregate holding of a person. In respect of the holding of a person there can be an aggregation of the tax payable on each urban land, for such aggregation is only for the purpose of finding out the total tax due by such person. But if the aggregation of the various urban lands held by a person for the purpose of imposing the charge under the charging section is made, then that becomes objectionable as it amounts to a tax on the value of the aggregate extent and not on the value of a unit of land which is made the subject-matter of the charge. *[Para.9]*

It is true that the levy of tax whether at a flat rate or at a progressive rate depending upon the size of the unit cannot make the tax invalid provided the tax is levied on the subject-matter of tax, that is the unit of urban land in this case. Thus the mere adoption of a progressive rate of tax cannot make levies illegal. However, in this case the progressive rate of tax is not levied on the subject-matter of the charge, but on the aggregate of the units of the urban land which alters the tax from a tax on land and building into a tax on the aggregate extent of one's holding and this makes it a tax on a part of one's wealth. *[Para.9]*

A tax on one's total holding of urban land is a tax on the partial wealth of a person. Thus by levying a tax on the aggregate extent of the holding of the urban land owned by a person, the tax levied under the Act ceases to be a tax on land and becomes a tax one one's holding of urban land. Such a tax cannot be comprehended within the scope of entry "tax on land". This situation has been brought about by the amending Act 49 of 1975 when the present schedule to the Act has been introduced which contemplates the rate of tax being applied on the aggregate extent of urban land held by a person in the urban area. *[Para.9]*

Since the principle of aggregation alters the character of the impost from tax on one's holding of urban land which is part of his wealth the word 'aggregate' occurring therein will have to be struck down. By striking down section 6-B and the word 'aggregate' occurring in the first column of parts I to IV of the schedule, the Act as such will continue to be constitutionally valid as a piece of legislation falling under Entry 49 of List II. *[Para.9]*

The Act cannot be impugned on the ground of the tax being harsh and excessive.

Cases referred to:-

Asst. Commr. Madras v. B. & C. Company, (1970)1 S.C.J.265: (1970)1 An.W.R. (S.C.) 55: (1970)1 M.L.J. (S.C.) 55: (1970)1 S.C.R.268: 75 I.T.R.603: A.I.R. 1970 S.C.169; *Buckingham & Carnatic Co. Ltd., v. State of Madras*, (1966)2 M.L.J.172; *Sudhir Chandra Nawn v. Wealth Tax Officer*, (1968)2 I.T.J.724: (1968)2 S.C.J.790: 69 I.T.R.897: A.I.R.1969 S.C.59; *Prithvi Mills v. Broach Municipality*, (1970)1 S.C.J.288: (1970)1 S.C.R.388: A.I.R.1970 S.C.192; *Union v. H.S.Dhillon*, (1972)2 I.T.J.258: (1972)2 S.C.J. 379: 83 I.T.R.582: (1972)2 S.C.R.33: A.I.R.1972 S.C.1061; *Gordhandas Hargovindas v. Municipal Commissioner, Ahmedabad*, (1965)1 S.C.J. 15: (1964)2 S.C.R. 608: A.I.R.1963 S.C.1742; *Hari Krishna Bhargav v. Union of India*, (1966)1 S.C.J.131: 59 I.T.R. 243: (1966)2 S.C.R.22: (1966)1 I.T.J.77: A.I.R.1966 S.C.619.

P.V.Marthandam, P.Chidambaram, C.S.Vaidyanathan and *D.Murugesan*, for Petitioners.

The Advocate-General, assisted by *K.S. Bakthavatsalam*, Addl. Govt. Pleader, for Respondents.

The Judgment of the Court was delivered by

Ramanujam, J.:- In these writ petitions the petitioners have sought the issue of a writ of declaration from this Court declaring the Tamil Nadu Urban Land Tax Act, 1966 as amended by Tamil Nadu Act 30 of 1971, 14 of 1973 and 49 of 1975 to be unconstitutional and void.

2. The urban lands involved in Writ Petition No.4397 of 1978 are town survey Nos.108/2 and 108/3 measuring 11 grounds and 1826 sq.ft. comprised in Door No.127, Lloyds Raod, Madras and the same has been originally assessed under the Tamil Nadu Urban Land Tax Act, 1966, hereinafter referred to as the Act at the rate of Rs.1,366-50 per year. On 22nd November, 1977, a notice was issued by the Assistant Commissioner of Urban Land Tax tentatively fixing the market value per ground in regard to that property at Rs.42,000. After considering the objections of the owner, the value has been fixed at Rs.28,000 per ground as on 1st July, 1973 and subsequently the Urban Land Tax Officer has issued a demand in 1978 calling upon the petitioner to pay the urban land tax at the rate of Rs.1,999 per fasli for the years 1385 to 1387. At that stage the petitioner has come forward with the writ petition seeking relief of declaration that the said Act is unconstitutional and void.

3. The petitioner in Writ Petition No.4439 of 1978 is the owner of premises No.31 (old No.25) Santhome High Raod, Madras-4 comprising 24 grounds and 1568 sq.ft in survey No.2426/4 and 2526/5. That property has been subjected to assessment under the Act by an order of the second respondent in the said Writ Petition dated 31st August, 1974 at Rs.3,078.50 per year taking the market value of the land at Rs.12,000 per ground. Subsequently, on 27th June, 1978 the second respondent issued a notice under section 11(1) read with sections 7-B and 40-A of the Act as amended in 1975 proposing to revise the value at Rs.24,000. After considering the objections, the second respondent has passed an order dated 27th July, 1978, assessing the property to a tax of Rs.12,313.60 per year, on the basis of the value of the lands at Rs.24,000 per ground for the entire extent of 25 grounds and 1,568 sq.ft. deducting two grounds as used for residential purpose which is exempted. Following the said assessment, demands under section 14 have been issued by the third respondent for faslis 1385 to 1388 aggregating to Rs.49,254-40. It is at this stage the petitioner has approached this Court seeking a declaration that the Act under which the assessment has been made is unconstitutional and void.

4. Since the contentions raised in both the writ petitions are substantially the same, the writ petitions are dealt with together and the grounds of attack which are common are set out below:- (1) Though the validity of the original Act of 1966 was upheld by the Supreme Court in *Assistant Commissioner, Madras v. B. & C. Co.*, (1970)1 S.C.J. 265= (1970)1 An.W.R. (S.C.)55= (1970)1 M.L.J. (S.C.) 55= (1970)1 S.C.R.268= 75 I.T.R.603= A.I.R.1970 S.C.169, the Act as amended from time to time makes it an Act imposing tax on the capital value of the assets of inviduals and companies and, therefore, it has ceased to be a law on "tax on lands and building" found in Entry 49 of List 2, of Schedule 7 to the Constitution. (2) The impugned Act in so far as it encroaches upon the field covered by Entry 86 of List I it has to be struck down as incompetent and unconstitutional. (3) The Act is violative of Article 14 of the Constitution in that there are no guidelines for arriving at the market value of the whole extent and the provisions of the Act operate differently in the case of different persons. The tax which is levied at a progressive rate operates unevenly on the landowners depending on the extent of their holding. (4) The Act, in so far as it makes a difference in the exemption limits between Parts I and II and Parts III and IV of the Schedule to the Act is arbitrary, discriminatory and violative of Article

14 of the Constitution. (5) In any event the tax imposed by the impugned Act being unreasonable, expropriatory, it infringes on the petitioner's right to hold and dispose of property.

5. The said grounds of attack are met in the counter-affidavit filed by the respondents as follows:- The petitioner has not exhausted the alternative remedy provided under section 20 of the Act and therefore, the writ petitions are liable to be dismissed on that ground alone. The Act as amended from time to time is quite legal and valid and it has already been upheld by the Supreme Court. The tax levied is a tax on land and therefore, it is within the competence of the State Legislature to enact the Act in question. Thus the stand taken by the respondents is that the Act has already been upheld by the Supreme Court as constitutional and therefore no further constitutional attack is possible by the petitioners. They also rely on a decision of Varadarajan, J. as he then was in *Cosmopolitan Club v. State of Tamil Nadu*, W.P.No.3491 of 1976 dated 16-10-1979 holding that the Act as amended is constitutionally valid as falling within Entry 49 of List II of 7th Schedule to the Constitution.

6. To appreciate the constitutional attack made by the writ petitioners it has become necessary to trace the legislative history of the said statute. Tamil Nadu Urban Land Tax Act, 1966 (Tamil Nadu Act 12 of 1966) received the assent of the President on 9th September, 1966 and the same was published in the Fort St.George Gazette on 10th September, 1966. All the provisions of the Act except sections 19, 47 and 48 came into force in the City of Madras on the first day of July, 1963 and sections 19 and 47 were made effective in the City of Madras on the 21st May, 1966 and Section 48 was to come into force on the 10th September, 1966 the date on which it was published in the Fort. St. George Gazette. The provisions of the Act shall come into force in any other municipal town or township or any area specified in the notification and within sixteen kilometres of the City of Madras or such municipal town or township on such dates as may be specified in a notification issued by the Government for the purpose. It is unnecessary to deal with the various provisions of the Act in the light of the contentions urged before us and we have to consider the scope of only sections 5, 5-A, 6, 6-A and 6-B of the Act and the schedule thereto. Sections 5 and 6 as originally enacted were as follows:-

> 5."Subject to the other provisions contained in this Act, there shall be levied and collected for every fasli year commencing from the date of commencement of this Act, a tax on each urban land (hereinafter referred to as the urban land tax) from the owner of such urban land (at the rate specified in the schedule."
>
> 6. "For the purpose of this Act, the market value of any urban land shall be estimated to be the price which in the opinion of the Assistant Commissioner, or the Tribunal, as the case may be such urban land would have fetched or fetch, if sold in the open market on the date of the commencement of this Act."

Sections 6-A and 6-B were inserted into the Act by Tamil Nadu Amending Act 30 of 1971. By amending Act 19 of 1973 the Schedule to the Act was altered. Then came Tamil Nadu Act 49 of 1975 under which sections 6-A and 6-B and the Schedules to the Act were re-cast. Section 6-A as amended directed that the area comprised in (a) City of Madras, (b) the Madras City Belt Area (c) any municipal town, (d) the area within sixteen kilometres of the outer limits of such municipal town, (e) any of the township, (f) the area within sixteen kilometres of the outer limits of such township, shall each constitute a separate urban area and for the purpose of assessment under the Act, the extent of urban land held by the owner in one urban area shall not be included in the extent of the urban land held by him in another urban area.

Section 6(β) provided (i) that the total extent of the urban land which is vacant or which is used for residential purposes in an urban area shall be taken into account for applying the rates specified in Parts I and III of the Schedule, and (ii) the total extent of the urban land used non-residential purposes in an urban area shall be taken into account for applying the rates specified in Parts II and IV of the Schedule. The said amending Act also substituted a new Schedule containing Parts I to IV. Part I deals with urban land which is vacant or is used for residential purposes and it provides that in respect of such urban land two grounds will get exempted and the rest of the extent will suffer a progressive rate of tax ranging from 7% to 25% depending on the extent Part II deals with urban land used for non-residential purposes and it provides an exemption for half a ground and brings to tax the land in excess of half a ground at the progressive rate of tax ranging from 5% to 2.5% depending upon extent. Part III deals with urban land in the Madras City Belt areas which is vacant or is used for residential purposes and it provides for an exemption limit of three grounds and the rest of the extent is subjected to a progressive rate of tax ranging from 7% to 2.5%. Part IV deals with urban land in the Madras City Belt Area which is used for non-residential purposes and it provides for an exemption of one ground and subjects the excess extent to progressive rate of tax ranging from 5% to 2.5% depending upon the extent of the land. Thus there are three prominent features in the Act as amended by Tamil Nadu Act 49 of 1975: (1) There is an aggregation of the extent of the urban land for the purpose of tax. (2) Basic exemption upto a particular limit has been provided, and (3) there is a progressive rate of tax depending upon the extent of urban land held by an individual. Then the State Government has passed G.O.Ms.No.2625, Revenue Department, dated 27th December, 1976 giving the following directions: (1) The distinction introduced by the 1975 amendment between lands used for residential purposes and lands used for non-residential purposes will be given up, and all urban lands in any given area will be subject to the same rate structure. (2) The market value of the land for the purposes of assessment to the tax will continue to be determined as on 1st July, 1971 provided that where the revised market value as on 1st July, 1971 is more than double the value as on 1st July, 1963, the value for purposes of assessment to tax will be limited to double the 1963 value. (3) As a result of 1975 amendment, the first two grounds would be exempted from tax wherever the total holding does not exceed five grounds, but however, this exemption will be extended to all holdings irrespective of the total extent. (4) The rate of tax on holdings exceeding 10 but not exceeding 20 grounds will be reduced from 2 per cent to 1.5 per cent and on holdings exceeding 20 grounds from 2.5 per cent to 2 per cent. Thus as per the said G.O. the revised rates structure will be as follows:-

All urban lands in areas other than the Madras Belt area.		*All urban lands in the Madras Belt area.*	
1. First 2 grounds	Nil	First 3 grounds	Nil
2. Where the aggregate extent does not exceed grounds.	0.7. per cent of Market Value.	Where the Aggregate extent does not exceed 7 grounds.	0.7 per cent of Market Value.

3. Where the aggregate extent exceeds 5 grounds but does not exceed 10 grounds	1 per cent of Market Value		Where the aggregate extent exceeds 7 but does not exceed 10 grounds	1 per cent of Market Value.	
4. Where the aggregate extent exceeds 10 but does not exceed 20 grounds	1.5 per cent of Market Value	On the extent in excess of 2 grounds	Where the aggregate extent exceeds 10 but does not exceed 20 grounds	1 per cent of Market Value	On the extent in excess of 3 grounds
5. Where the aggregate extent exceeds 20 grounds	2 per cent of Market Value		Where the aggregate extent exceeds 20 grounds	2 per cent of Market Value.	

The G.O. also provided for remission of tax to 50 per cent in the case of any building occupied only by the owner for residential purposes in respect of the land on which the building is constructed and the urban land appurtenant to it. However the statute has not yet been amended to give effect to the said G.O. It is in the light of the above provisions, we have to consider the tenability of the contentions urged by the petitioners.

7. The petitioners' submission is as follows:- The Act imposes a tax on each urban land as is seen from section 5 which imposes a levy for every fasli year a tax on each urban land from the owner of such urban land at the rates specified in the Schedule to the Act. "Each urban land" is defined under section 2(6) of the Act as the urban land comprised in a survey number or a sub-division number. Thus the unit of assessment is a land comprised in each survey number or sub-division number. When the charging Section imposes a tax on each survey number or sub-division which is taken as a unit for purpose of assessment, section 6-B aggregates the units of urban land for purposes of tax as that section directs that the total extent of the urban land in an urban area held by a person should be taken into account for applying the rates specified in the Schedule. The rate of tax provided for in the various parts of the Schedule also proceed on the basis of the said aggregation, and the tax levied also depends on such aggregation. According to the petitioner such aggregation of the units or urban land and applying a progressive rate of tax depending upon the total extent will clearly take the Act out of Entry 49 of List II and bring it within the scope of Entry 86 of List I. This aspect of the matter was not and could not be considered by the Supreme Court in *Assistant Commissioner, Madras v. B. & C. Co. Ltd.*, (1970)1 S.C.J.265= A.I.R.1970 S.C.169 while upholding the constitutional validity of Tamil Nadu Act 12 of 1966 in its unamended form. This peculiar situation arises for consideration for the first time now in view of the amendment brought about by Tamil Nadu Act 49 of 1975. The petitioner's learned counsel refers to the decision of the Supreme Court in *Assistant Commissioner, Madras v. B. & C. Co. Ltd.*, (1970)1 S.C.J.265= A.I.R.1970 S.C.169 in support of his submission that the Supreme Court was dealing with the provisions of the Act which are substantially different from those which operate now and, therefore, the decision of the Supreme Court upholding the validity of the Act cannot prevent them from raising the question of the constitutional validity of the Act based on the provisions of the Act as amended now. The predecessor to the present Act, the Madras Urban Land Tax

Act, 1963 which levied a tax by section 3 on every owner of urban land at the rate of 0.4 per cent of the average market value of the urban land as determined under section 6(2) of the Act was challenged as violating Article 14 of the Constitution of India, because the charging section levied the tax on urban land not on the basis of the market value of such land, but on the average value of the land in a sub-zone and the said challenge was upheld by the Division Bench of this Court in *Buckingham & Carnatic Co. Ltd. v. State of Madras*, (1966)2 M.L.J.172. Thereafter Act 12 of 1966 came to be enacted omitting the provisions relating to fixation of average market value in the sub-zone and instead introducing section 5 providing for a charge on each urban land from the owner of such urban land at the rate of 0.4% of the market value of such urban land. The validity of Act 12 of the 1966 was also challenged before this Court and it was held by a Full Bench of this Court that though the Madras Legislature was competent to enact the new Act, under Entry 49 of List II the Act is violative of Articles 14 and 19(1)(f) of the Constitution. The matter was taken to the Supreme Court. The challenge before the Supreme Court was (1) that the Act fell under Entry 86 of List I and not under Entry 49 of List II and that the State legislature is incompetent to pass the Act. (2) That the machinery provided for determining the market value is violative of Article 14 of the Constitution and (3) that the Act imposes an unreasonable restriction on the right to acquire and dispose of the property and therefore, violative of Article 19(1)(f). The Supreme Court held that the Act was constitutionally valid, for, (1) the pith and substance of the new Act in imposing a tax on urban land of a percentage of the market value is entirely within the ambit of Entry 49, List II and it does not any way trench upon the field of legislation under Entry 86 of List I, (2) that the provisions of section 6 of the Act were not violative of Article 14 as the opinion which the Assistant Commissioner has to form under that section is not subjective but should be reached objectively upon the relevant evidence after following the requisite formalities laid down in Sections 7 to 11 of the Act, (3) that the Act is not violative of Article 19(1)(f) of the Constitution as the power of taxation has to be regarded as an essential attribute of sovereignty and the object to be taxed, the quantum of tax to be levied, the condition subject to which it is levied and the social and economic policies which a tax is designed to subserve are all matters of political character entrusted to the Legislature and not to the Courts and therefore, so long as the tax imposed is not confiscatory or extortionate, the reasonableness of the tax cannot be questioned. Thus the point urged before the Supreme Court was that section 5 in so far as it imposes a tax on urban land at a percentage of the market value is outside the competence of the Legislature. It is that point which was rejected by the Supreme Court. It is significant to note that the Act as originally enacted which was considered by the Supreme Court in the above case did not contemplate aggregation of the urban lands in the hands of the owner for purposes of tax. Section 5 contemplated a levy of tax on each urban land in the hands of the owner at the rate of 4% of the market value of such urban land and if a person happens to own more than one urban land then the tax is levied on each urban land and the tax is aggregated to determine the total tax liability of the person concerned. Thus earlier there was no aggregation of the urban land for the purpose of adopting the rate of tax but it is only the tax as levied on each urban land which was aggregated in the hands of the person. But, now after the amending Act, 1975, came into force the situation is different. Now there is an aggregation of the urban lands as such. Though the Act provides for a levy of tax on each urban land section 6-B along with the Schedule brings to charge the total urban land owned by an individual at the appropriate rate of tax as provided in the various parts of the Schedule. In the Act as originally enacted, there

was a uniform levy of tax at 4 per cent of the market value of each urban land whereas now after the amendment though section 5 imposes a charge on each urban land the rate of tax does not depend upon each urban land but depends upon the aggregate extent of land owned by a person and there is a progressive rate of tax depending upon the extent of the land owned by the person. According to the petitioner, once there is an aggregation of the urban lands and the tax is levied on the aggregate extent then the Act will cease to fall under Entry 49 of the List II but will fall under Entry 86 of List I. It is said that the principle of aggregation and the imposition of tax on the totality of the net value of the assets is peculiar to Entry 86 of List I, and Entry 49 of List II can only enable the State Legislature to levy tax on land or building or both as units and it is not concerned with the ownership in the units of the land or buildings which are brought to tax and that in this case the ownership of the lands by the particular person has alone been taken as the basis for imposition of tax and hence the Act goes outside the purview of Entry 49 of List II. In support of this submission the following passage in *Assistant Commissioner v. B. & C. Ltd*, (1970)1 S.C.J.265= (1970)1 S.C.R.268= A.I.R.1970 S.C.169 was relied on:

"In our opinion there is no conflict between Entry 86 of List I and Entry 49 of List II.

The basis of taxation under the two entries is quite distinct. As regards Entry 86 of List I the basis of the taxation is the capital value of the asset. It is not a tax directly on the capital value of assets of individuals and companies on the valuation data. The tax is not imposed on the components of the assets of the assessee. The tax under Entry 86 proceeds on the principle of aggregation and is imposed on the totality of the value of all the assets. It is imposed on the total assets which the assessee owns and in determining the net wealth not only the encumbrances specifically charged against any item of asset, but the general liability of the assessee to pay his debts and to discharge his lawful obligation have to be taken into account. In certain exceptional cases, where a person owes no debts and is under no enforceable obligations to discharge any liability out of his assets it may be possible to break up the tax which is leviable on the total assets into components and attribute a component to lands and buildings owned by an assessee. In such a case, the component out of the total tax attributable to lands and buildings may in the matter of computation bear similarity to tax on lands and buildings levied on the capital of annual value under Entry 49, List II. But in a normal case a tax on capital value of assets bears no definable relation to lands and buildings which may or may not form a component of the total assets of the assessees. But Entry 49 of List II contemplates a levy of tax on lands and buildings or both as units. It is not concerned with the division of interest or ownership in the units of lands or buildings which are brought to tax. Tax on lands and buildings, is directly imposed of lands and buildings and bears a definite relation to it. Tax on the capital value of assets bears no definable relation to lands and buildings which may form a component of the total assets of the assessee. By legislation in exercise of power under Entry 86 of List I tax is contemplated to be levied on the value of the assets. For the purpose of levying tax under Entry 49, List II, the State Legislature may adopt for determining the incidence of tax, the annual or the capital value of the lands and buildings. But the adoption of the annual or capital value of lands and buildings for determining tax liability will not make the field of legislation under the two entries overlapping. The two taxes are entirely different in

their basic concept and fall on different subject matters."

In *Sudhir Chandra Nawn v. Wealth Tax Officer*, (1968)2 I.T.J.724= (1968) 2 S.C.J.790= 69 I.T.R.897= A.I.R.1969 S.C.59 the respective ambit of Entry 49 of List II and Entry 86 of List I was considered and explained. It was pointed out that unlike the tax contemplated by Entry 49 of List II, the tax under Entry 86 is not a direct tax on lands and buildings but on the assets the components of which may be lands and buildings and other items of assets including such liabilities that may exist, that the incidence of tax is not on lands and buildings which is unit of taxation but on the net assets of which lands and buildings are only some of the components. The Supreme Court pointed out that the tax under Entry 86 of List I is a tax on the aggregate value of the components while the tax under Entry 49 of List II is a tax on units of taxation. In *Prithvi Mills v. Broach Municipality*, (1970)1 S.C.J.288= (1970)1 S.C.R.388= A.I.R.1970 S.C.192 the Supreme Court reiterated the principle laid down in *Sudhir Chandra Nawn v. Wealth tax Officer*, (1968)2 I.T.J.724= (1968)2 S.C.J.790: 69 I.T.R. 897= A.I.R.1969 S.C.59 that the tax under Entry 86 of List I is a tax on net assets, the components of which may be lands and buildings while the incidence of tax under Entry 49 of List II is on the unit of taxation. To the same effect is the decision in *Union v. H.S.Dhillon*, (1972)2 I.T.J.258= (1972)2 S.C.J.379= 83 I.T.R.582= (1972)2 S.C.R.33= A.I.R.1972 S.C.1061 where again the relative scope of Entry 49 of List II and Entry 85 of List I was considered and it was held that the concept of tax on net wealth is one entirely different from the concept of tax attributable to lands and buildings as such, that the levy on land and building has no direct relationship to the aggregate value of the assets of an individual and that even assuming that Entry 49 of List II envisages imposition of a tax on lands and buildings, adopting the mode of certain percentage of the capital value of lands and buildings must still be subject to taxation as units and no aggregation is possible. In *Patel Gordhandas Hargovindas v. Municipal Commissioner, Ahmedabad*, (1964)2 S.C.R.608= (1965)1 S.C.J. 15= A.I.R.1963 S.C.1742 the Ahmedabad Municipality levied a tax on the vacant land at the rate of 1% on the valuation based upon capital on the basis of Rule 350-A framed under the Bombay Municipal Boroughs Act, 1925. The said levy was challenged on the ground that the Municipality cannot levy the rate at a percentage of the capital value of the open lands and that if the Act permitted the levy of a rate on a percentage of the capital value of the land, that is *ultra vires* the provincial legislature. Dealing with the said contention the Court pointed out that the Act imposes a tax on lands and was within Item 42 of List II of the Government of India Act, 1935 (corresponding to Entry 49 of List II), that the fact that the Act authorised the tax being quantified on the basis of the capital value of the land does not take it out of the said item and place it under item 55 of List I dealing with tax on capital value of the assets which only the Central Legislature can levy, that the identification of the subjectmatter of the tax is to be found in the charging section only and the subject-matter of the charging section which imposes a levy on land and not the capital value of it, that the subject-matter of taxation is something different from the measure provided for quantification of the tax and one has got no effect on the other and the measure of tax being based on the capital value, the tax is none the less a tax on land.

8. Based on the distinction pointed out in the above cases as to the relative scope of Entry 86 of List I and Entry 49 of List II the submission of the petitioners is that the subject-matter of tax as found in the charging section 5 is on urban land which is defined as land comprised in a survey number or sub-division number and in so far as the Act proceeded to levy tax not only on the subject-matter of the charge but on the aggregate extent.

of the lands held by the person, it ceases to be a legislation under Entry 49 of List II.

9. After a due consideration of the matter we are inclined to agree with the submission made by the learned counsel for the petitioners on questions 1, 2, and 3. The unit of assessment is a Survey Number or sub-division number as per section 5 read with the definition of "each urban land" occurring in section 2(6) of the Act as land comprised in a survey number or a sub-division number. So the subject-matter of the charge is only a survey number or a sub-division number held by the owner. The said charging section stands as it is without any modification. While the subject-matter of the tax is only the land comprised in a survey number or sub-division number, we do not see how the aggregation could be made of all the lands held by the person within an urban area and bring the same to charge by adopting a progressive rate of taxation. No doubt, if the tax is levied on a unit of urban land, that is, in respect of each survey number or sub-division number, there cannot be any objection for the progressive rate of tax to be applied for such unit of land. Even in levying income-tax taking the income of the year as a unit, progressive rate of tax has been adopted and merely because a progressive rate of tax is adopted as a measure the levy of income-tax cannot be challenged. Similarly, the levy of tax whether at a flat rate or at a progressive rate depending upon the size of the unit cannot make the tax invalid provided the tax is levied on the subject-matter of tax, that is, the unit of urban land in this case. Thus the mere adoption of a progressive rate of tax cannot make levies illegal. However, in this case the progressive rate of tax is levied not on the subject-matter of the charge but on the aggregate of the units of urban land which alters the tax from a tax on land and building into a tax on the aggregate extent on one's holding and this makes it a tax on the aggregate extent of one's wealth. As pointed out already, in the decisions of the Supreme Court referred to above, the distinguishing characteristics of a tax on land is that it is a tax on a unit of land and not a tax on the aggregate of one's holding. A tax on one's total holding of urban land is a tax on the partial wealth of a person. Thus by levying a tax on the aggregate extent of the holding of the urban land owned by a person, the tax levied under the Act ceases to be a tax on land and becomes a tax on one's holding of urban land. We are clearly of the view that such a tax cannot be comprehended within the scope of the Entry "tax on land". As already stated this situation has been brought about by the amending Act 49 of 1975 when the present Schedule to the Act has been introduced which contemplates the rate of tax being applied on the aggregate extent of urban land held by a person in the urban area. Though the charging section 5 contemplates the rates specified in the Schedule being applied on each urban land, before the introduction of section 6-B and the Schedule to the Act, the Act clearly fell within Entry 49 of List II and it has been so held categorically by the Supreme Court. It is only after the introduction of section 6-B and the introduction of the idea of aggregation in the Schedule the character of the tax is changed and instead of taxing the unit of land the aggregate holding of a person is brought to charge. It is well-established that to find out whether a particular statute comes within the legislative competence of the legislature it is the pith and substance of the legislation that will be determinative. The pith and substance of a taxation statute has to be determined with reference to the charging section. The charging section imposes a charge only on a unit of urban land which according to the definition is a survey number or a sub-division number. Therefore the charge of tax under the statute falls squarely within Entry 49 of List II. However, section 6-B which is a machinery provision goes beyond the charging section and levies the tax mentioned in the schedule on the total extent of urban land and not on each urban land which is taken as

a unit for the purpose of tax. It is section 6-B which alters the nature of the tax and converts the tax as one on the aggregate holding of a person. In respect of the holding of a person, there can be an aggregation of the tax payable on each urban land, for, such aggregation is only for the purpose of finding out the total tax due by such person. But, if the aggregation of the various urban lands held by a person for the purposes of imposing the charge under the charging section is made, then that becomes objectionable as it amounts to a tax on the value of the aggregate extent and not on the value of a unit of land which is made the subject-matter of the charge. Section 6-B not only runs counter to the charging section but also makes the entire statute open to constitutional attack that the tax levied falls outside Entry 49 of List II and therefore it should be struck down. Even without section 6-B the Schedule to the Act stands attracted by section 5. The Entry in Column 1 in Parts I to IV of the Schedule uses the expression "where the aggregate extent of urban land held by the owner in the urban area. "Since the principle of aggregation alters the character of the impost from tax on urban land to a tax on one's holding of urban land which is part of his wealth, the word, 'aggregate' occurring therein will have to be struck down. By striking down section 6-B and the word 'aggregate' occurring in the first column of Parts I to IV of the Schedule, the Act as such will continue to be constitutionally valid as a piece of legislation falling under Entry 49 of List II. Therefore, we strike down the entire section 6-B and the expression "aggregate" occurring in column 1 of Parts I to IV of the Schedule. With respect we are not inclined to agree with the view expressed by Varadarajan, J. as he then was, in W.P.No.3491 of 1976 batch referred to above.

10. Coming to question No.4, it is already seen that Government in exercise of its powers under section 27 of the Act had passed G.O.Ms.No.2625, Revenue, dated 27th December, 1976 giving a uniform exemption of 2 grounds irrespective of the total extent and abolishing the distinction between lands used for residential and non-residential purposes. In view of this the said question does not arise for consideration. Finally, coming to question No.5, We are of the view the Act cannot be challenged on the ground that the tax is harsh and excessive, in view of the decision of the Supreme Court in *Hari Krishna Bhargav v. Union of India*, (1966)1 S.C.J.131= 59 I.T.R.243= (1966)2 S.C.R.22= (1966)1 I.T.J.77= A.I.R.1966 S.C.619 wherein it has been held that a taxing statute cannot be challenged merely on the ground that it is harsh and excessive. Hence there is no merit in that contention.

11. The writ petitions are therefore allowed to the extent indicated above with reference to questions 1 to 3. There will, however be no order as to costs.

R.S. ---- *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:- *Chandurkar, C.J. and Sathiadev, J.*

*W.P.Nos.9471 etc of 1982, 72 etc, of 1983 and 573 etc of 1984.

20th March, 1985.

Sree Murugan Financing Corporation, Chit Promoters and Financiers, Coimbatore-18. *Petitioner**

v.

The State of Tamil Nadu, rep. by the Secy. to Govt. Commercial Taxes and Religious Endowments, Dept., Madras-9 and another *Respondents.*

(A) Tamil Nadu Chit Funds Act (24 of 1961), section 3 - Tamil Nadu Chit Funds Rules (1964) Appendix II Article 1 and 8-A as amended by G.O.Ms.No.1075 dated 23rd September, 1981 - Rule as amended struck down as invalid.

(B) Tax and Fee - Distinction between.

(C) Constitution of India (1950), Article 14 - Tamil Nadu Chit Fund Rules Articles 1 and 8-A as amended arbitrary, hostile, discriminatary and unreasonable restrictions on trade.

Persons conducting chits after securing registration under section 3 of the Tamil Nadu Chit Funds Act, 1961, sought a declaration that the amendments to Article 1 and insertion of Article 8-A to Appendix of the Tamil Nadu Chit Fund Rules, 1964 in exercise of powers under section 63 of the Act which became operative from 26-10-1981 on their publication in the Gazette of G.O.Ms. No.1075, Commercial Taxes and Religious Endowments dt.23-9-1981, were not constitutionally valid.

Held:- As to whether a particular levy is a fee or a tax, it is a question of fact to be determined in the circumstances of each case by reference to the entire scheme of the Act. The duties, obligations and nature of work done by the authority to those connected with the transaction which is subjected to the imposition of fee and ear-marking the funds collected for that specific purpose, etc. are to be taken into account and if the State justifies the levy as a fee based on such tests, then alone it will be valid. *[Para.21]*

The Act is made to provide for the regulation of Chit Funds in the State of Tamil Nadu. Section 16(2) refers to what a balance sheet should contain. Rule 26 says that it shall be in Form No.X. When such balance sheets are filed in the prescribed Form, it calls for scrutiny, so that the interests of the subscribers may be safeguarded. This being one of the essential purposes envisaged under the Act, merely because section 16 is not enumerated in clauses (a) to (f), it cannot be held that the fee now imposed relating to balance sheets would not come within the aforesaid clause (g). Once the power is traceable, an erroneous indication of the section would not invalidate the valid exercise of power. Such mistakes are avoidable, if proper care is taken. *[Para.22]*

As to the impugned G.O. except to point out that the Director of Chits felt that the adoption of a different basis would bring about rationalisation of rates, the respondent State had not placed before the Court either in the form of an affidavit or by producing records as to what were the equitable factors which were taken into account for change of basis or in imposing higher rate. *[Para.23]*

Merely because it is held that registration fee is a regulatory measure, it would not mean that any rate can be fixed having no nexus to what services are contemplated for that purpose under the Act. Furthermore, the increased levy is not due to any amendment effected in relation to registration of by-laws calling for nature of services to be extended than what were obtaining prior to the G.O. When the nature and extent of services envisaged under section 3(3) having

remained the same, unless it be shown that for extending the same services, the expenses had increased, the demand made partakes the character of a tax. [Para.26]

When a balance sheet certified by a Chartered Accountant is produced, the Registrar would be concerning himself only with regard to the particulars incorporated in the balance sheet, profit and loss account, the auditor's certificate and the report of the auditor. When a Chartered Accountant's certificate is filed, it cannot be said that in all these cases where such certificates are filed, once over the same work done by a Chit Auditor is carried out justifying the same rate of fee being charged. It may be that whenever any irregularities are found, it may call for a fresh clarification from the Foreman, but that would not mean that for all chits without exception the Registrar discharges the same kind of services as done when a Chit Auditor is requisitioned. It must be pointed out that when fee is collected under Article 8, it includes the services rendered by the Chit Auditor and also the services of scrutiny by the Registrar, who acts upon such certificates; whereas for the same fee paid when a Chit Auditor's certificate is filed, it results only in scrutiny by the Registrar and nothing more. Hence, to treat unlike situations as one and the same and impose same rate of fees, is arbitrary and illegal. When rules themselves do not contemplate production of registers, books of accounts and other records, the claim made that pursuant to the filing of the balance sheet, records have to be verified and that the whole matter has got to be thoroughly examined is unacceptable. Hence when the rules themselves contemplate a different type of services to be rendered when Chartered Accountants certificates are filed, the fee imposable under Article 8-A cannot be the same as in Article 8 which contemplates more comprehensive services to be rendered. Therefore, the necessary element of *quid pro quo* is not existing, and furthermore, this is an unreasonable restriction on the right of trade and the rate fixed is aimed at increasing general revenues. [Para.28]

Percentage indicated cannot be relevant indicia, but the aspect of *quid pro quo* is a relevant test to be applied to find out whether there is a broad relationship between the funds recovered and the amounts expended for carrying out the special services contemplated under the Act. In this perspective, even on taking into account the totality of income and expenditure for all services rendered under the Act, it transpires that after the increased fee was imposed in 1980-81 in spite of the deficit which was experienced in the earlier years, the excess collected in 1981-82, itself was Rs.7,95,519-03. This is nearly 70 per cent more than expenditure. [Para.33]

The income derived by the State subsequent to the enforcement of the Central Act is not taken into account. Thus it is quite apparent on particulars furnished by the State that the rates fixed were disproportionately high having no nexus to the nature of services rendered, and is intended to augment revenues partaking the character of tax. Hence the impugned levies suffer from the vice of arbitratiness hostile discrimination and unreasonable restriction on trade. For all reasons above stated, Articles 1 and 8-A in Appendix II to the Tamil Nadu Chit Fund Rules, 1964 are struck down as invalid. [Paras.33,34]

Cases referred to:-

Commr. of H.R. & C.E. v. Lakshmindra Theertha Swaminar of Shirur Mutt, (1954)1 M.L.J.596: 1954 S.C.J.335: 1934 S.C.R.1005: A.I.R.1954 S.C.282: 67 L.W.1220 (S.C.); *Ratilal Panachand Gandhi v. The State of Bombay*, 1954 S.C.J.480: (1954)1 M.L.J.718: A.I.R.1954 S.C.388; *Sri Jagannath v. State of Orissa*, (1954)1 M.L.J.591= A.I.R.1954 S.C.400= 1954 S.C.J.329; *Hinger Rampur Coal Company v. State of Orissa*, (1961)2 S.C.R.537: A.I.R.1961 S.C.459; *Corporation of Calcutta v. Liberty Cinema*, (1965)2 S.C.R.477:

A.I.R.1965 S.C.1107; *D.C. & G.Mills Company v. Chief Commissioner, Delhi*, A.I.R.1971 S.C.344= (1971)2 S.C.J.40= (1970)2 S.C.R.348; *Secretary, Madras Government v. Zenith Lamp*, (1974)1 M.L.J. (S.C.) 43: (1974)1 An.W.R. (S.C.) 43: (1973)1 S.C.C.162: (1974)1 S.C.J. 111: (1973)2 S.C.R.973: A.I.R.1973 S.C.724; *Kewal Krishan Puri v. State of Punjab*, (1979)3 S.C.R.1217: (1980)1 S.C.C.416: A.I.R.1980 S.C.1008; *H.H.Swamiji v. Commissioner*, (1979)4 S.C.C.642: (1980)1 S.C.R.368: A.I.R.1980 S.C.1; *Southern Pharmaceuticals and Chemicals v. State of Kerala*, (1981) Tax.L.R.2838: A.I.R.1981 S.C.1863; *Municipal Corporation of Delhi, Delhi Municipality v. Mohd.Yasin*, A.I.R.1983 S.C.617= (1983)2 S.C.J.66= 142 I.T.R.737= (1983)3 S.C.C.229; *Sreenivasa General Traders v. State of A.P.*, (1983)4 S.C.C.353: A.I.R.1983 S.C.1246; *Tuticorin T. & C. Corporation (P) Ltd. v. State of Madras*, (1966)1 M.L.J.313; *C.C. Fund v. Union Territory of Pondicherry*, A.I.R.1972 Mad.99 84 L.W.515; *Govt. of A.P. v. Hindustan Machine Tools*, (1975)2 S.C.C.274: (1975) Tax.L.R.2013; A.I.R.1975 S.C.2037; *Chief Commissioner Delhi v. The Delhi Cloth and General Mills Co. Ltd.*, (1978)2 S.C.J.142= (1978)2 S.C.C.367= A.I.R.1978 S.C.1181.

P.Shanmugam, Jayaraman and Sreekumaran Nair, for Petitioner.

N.R.Chandran, Addl. Govt. Pleader, for Respondent.

The Judgment of the Court was delivered by

Sathiadev, J.:- Petitioners in these writ petitions conduct chit funds on securing registration under section 3 of the Tamil Nadu Chit Funds Act, 1961 (Tamil Nadu Act 24 of 1961) (hereinafter referred to as the Act). They seek for a declaration that the amendments effected to Article 1 and insertion of Article 8-A to Appendix II of the Tamil Nadu Chit Fund Rules, 1964 (hereinafter referred to as the Rules) are unconstitutional and illegal. The amendments are made in exercise of the powers conferred under section 63 of the Act. These amendments came into force with effect from 21st November, 1981, consequent to its publication in the Fort. St. George Gazette of G.O.Ms.No.1075, Commercial Taxes and Religious Endowments dated 23rd September, 1981. The amendments are to the following effect:

"*Annexure:* Notification

In exercise of the powers conferred by section 63 of the Tamil Nadu Chit Funds Act, 1961 (Tamil Nadu Act 24 of 1961), the Governor of Tamil Nadu hereby makes the following amendments to the Tamil Nadu Chit Funds Rules, 1964.

Amendment

In the said Rules in Appendix II, in the Table of Fees (1) for Article 1 and the entries relating thereto, the following Article and entries shall be substitued, namely-

1. for the Registration under section 3 by-laws of a chit	Rate of fees
(a) for chits for a term of less than one year Re.1	Re.1 per subscriber or instalment whichever is higher subject to a minimum of Rs. 50.
(b) for chits for a term of one year and above Rs.2.50.	Per subscriber or instalment whichever is higher subject to a minimum of Rs.50.
(c) (i) Chit amount of value upon Rs.5,000.. Rs.5.	Per subscriber or instalment whichever is higher subject to a minimum of Rs.50.
(ii) for chit amount of value between Rs.5001 and Rs.10,000.... Rs.5	Per Subscriber or instalment whichever is higher subject

	to a minimum of Rs.50.
(iii) chit fund of value between Rs.10,001 and Rs.20,000 ... Rs.5	Per Subscriber or instalment whichever is higher subject to a minimum of Rs.50.
(iv) for chit amount of value between Rs.20,001 and Rs.30,000 ...Rs.10	Per Subscriber or instalment whichever is higher subject to a minimum of Rs.50.
(v) for chit amount of value between Rs.30,001 and Rs.40,000 ...Rs.12	Per Subscriber or instalment whichever is higher subject to a minimum of Rs.50.
(vi) for chit amount of value between Rs.40,001 and Rs.50,000 ...Rs.15	Per Subscriber or instalment whichever is higher subject to a minimum of Rs.50.
(vii) for chit amount of value of exceeding Rs. 50,000 ...Rs.20	Per subscriber or instalment whichever is higher subject to a minimum of Rs.50.

(2) In Article 8 in Clause (b) for the letters and figures Rs.50 occurring in two places, the letters and figures Rs.250 shall be substituted;

3. After Article 8 as so amended, the following Article and entries shall be inserted, namely-

'8-A. For filing balance sheets audited and certified by Chartered Accountants;

(a) when the chit amount does not exceed Rs.500-Rs.10.

(b) When the chit amount exceeded Rs.500- for the first Rs.500 as under sub-clause (a) and for every Rs.500 or part thereof in excess of Rs.500 subject to the maximum of Rs.250. The fee leviable under this clause shall not exceed Rs.250."

2. The petitioners state that to start or conduct any chit, under section 3, they will have to apply to the Registrar for registration of the by-laws of the chit and as per rule 4, such application for registration has to be made by the Foreman under Form No.II and it shall be accompanied by the fees set out in Appendix II. Section 53(a) provides that Government may from time to time prescribe the fee that shall be paid to the Registrar for the registration of the by-laws of the chit under section 3. Rule 42 states that fees payable to the Registrar for matters specified in Section 53 shall be as set out in the Appendix II and shall be paid in cash. Article No.1 in Appendix II as originally framed provided only Rs.25 for the registration of the by-laws, and an amendment was made on 2nd November, 1979 revising the rates of registration as follows:-

Chit amount	*Fees levied*
Upto Rs.5,000	Rs. 50
Above Rs.5,000 and upto Rs.10,000	Rs.100
Above Rs.10,000 and upto Rs 20,000	Rs.150
Above Rs.20,000	Rs.200

It is by virtue of the amendment made in G.O.Ms.No.1075, Commercial Taxes and Religious Endowments, dated 23rd September, 1981 (hereinafter referred to as the "G.O.", the fees payable are charged on the basis of number of subscribers or instalments of the chit whichever is higher. This imposition being disproportionate to the services rendered and having no nexus to the object of regulating the chits, it is illegal, unconstitutional and *ultra vires* of the provisions of the Act.

3. For the first tire, for balance sheets audited by a Chartered Accountant a fee is imposed under Article 8-A. The rate of fee is the same fee which is charged when audited by chit-auditors

having no nexus to the extent of service rendered by the Department. As for the increase made under Article 8 it is not challenged in this petition. As section 53 does not authorise imposition of fees for balance sheets filed under section 16 of the Act and section 63 alone having been invoked in carrying out the amendments, it is *ultra vires* of the Act: No service is rendered by the Registrar on receiving the balance sheets and preserving them. The essential element of *quid pro quo* in the imposition of these fees is absent. So far as the Foremen are concerned the Registrar does not render any special service in furtherance of his business and the fee collected has no correlation to the expenses incurred in rendering service if any. The only ground relied upon in the impugned G.O. is that, to bring about rationalisation in rates the fee for registration has been revised taking into account the number of subscribers or the instalments whichever is higher, instead of the slab system which was prevailing prior to 21st October, 1981. If whatever is done by the Registrar at the time of registration are looked into the basis now adopted is highly irrational and unreasonable and the imposition is disproportionate and not at all commensurate to the nature of service claimed to be rendered. Merely because in the neighbouring State of Kerala, a higher levy is impsoed, the respondents have chosen to rely upon it to augument the general revenue of the State, and hence it is not a fee but a tax which is not authorised under the Act.

4. On behalf of the respondents in the counter-affidavit filed in W.P.Nos. 10552 and of 1981 and 1333 of 1982, it is contended that the levy of fees formerly prescribed had no relation to the duration of chits and in respect of chits of longer duration and larger number of instalments, greater amount of services had to be rendered, in that, more minutes were filed and, hence, it is equitable and fair to fix the rate for registration of by-laws taking into account the number of instalments or duration of a chit whichever is higher. While revising rates, these facts were taken into consideration. The Registrar of Chits has to check up whether the Foremen have taken proper surety for future payments of subscriptions from the prized subscribers; whether the proper receipts were obtained by due dates; and whether the prized amounts have been deposited into the bank, etc. The extracts filed in respect of removal, substitution and assignment, etc. have to be verified and when chits are for longer duration, the transactions will be more, and therefore, the verification process will impose greater responsibility on the Registrar of Chits. Considerable time is taken in watching the filing of various documents by the Foremen on due dates in proper form. The balance sheet under section 16 when filed requires to be verified for its correctness, with relevant records, such as by-laws, chit agreements, commencement certificates, minutes, etc. It is only on being fully satisfied that the procedures prescribed under the Act and the Rules have been complied with, the Chit Registrar will be in a position to release security to the Foremen. All these are done not only in the interests of the subscribers but also in the interests of the Foremen as well, and if these requirements have not been complied with, he would be liable to be punished by being prosecuted as provided under Chapter XI of the Act, which would disentitle him from securing registration of other chits. All these scrutinies are to benefit him to continue to be foreman for chits registered by him under the Act. The cost incurred in extending services to the Foremen and subscribers being commensurate as furnished in the counter-affidavit, there is an element of *quid pro quo* as enunciated in more than one Supreme Court decision.

5. Section 16 directs every Foreman to prepare and file with the Registrar a balance sheet regarding every chit. Rule 26 prescribes the form of balance sheet which should be in Form X, and rule 27 contemplates that it should be filed once in a year and also at the expiry of the period of the termination of chits. The fees levied are approximately equal to the amount spent

for the services rendered. The staff who are engaged is disclosed in para. 8 of the counter affidavit in W.P.No. 1333 of 1982, and the receipts and expenditure during the years mentioned therein would only show that it was not done to augment the revenue. The State had to provide at considerable expense, receptacles and iron safes for the preservation of records and securities, and this revision has taken place nearly after two decades, and intended to cover the reasonable expenses incurred for rendering services.

6. Under section 16, a balance sheet can be duly audited either by auditors duly qualified to act as auditors or companies under the Companies Act, 1956 or by a chit auditor appointed under section 51(2). Merely because a balance sheet is prepared by a Chartered Accountant, it does not mean that the Registrar is bound to act upon it as a conclusive document and that there is no need for him to verify the correctness of the balance sheet with other documents. A balance sheet is a very important document to find out whether the Foremen have conducted the chit according to the rules and whether the prized winners have been paid the amounts and other relevant details have to be looked into to know the financial stability and credibility of the Company. Hence, the Registrar has to scrutinise it with connected records to find out the correctness of the balance sheet prepared by a Chartered Accountant. If any deviations are disclosed in the balance sheet, then the Chit Registrar has to take further action. Before ordering release of security deposits to foremen, the Registrar has to satisfy himself that the requirements of section 12(3)(i) to (iii) are complied with. The whole matter has got to be thoroughly examined to see whether a particular year's transactions fully reflect the scope of such chit and whether the collections and disbursements including the commission retained by the Foreman have all been done in conformity with the Act and the Rules. Therefore it cannot be contended by petitioner that the Registrar does not extend any service commensurate to the fee imposed when audited balance sheets are filed. Hence, the enhancement of fees in respect of two items which are challenged in these writ petitions, is commensurate with the services extended, and not intended to augment the general revenues of the State. In spite of Chit Funds Act, 1982 (Central Act 40 of 1982), coming into force in so far as Tamil Nadu is concerned on 13th April, 1984, the provisions of Tamil Nadu Act 24 of 1961 and the Rules framed thereunder continue to apply to the chits in operation on the commencement of the Act and hence, the levy of fees for balance sheets filed subsequent to 13th April, 1984 for chits already registered is valid. Hence, none of the contentions raised by the petitioners could invalidate the imposition and collection of fees on the basis of revised rates.

7. A reply affidavit is filed stating that the shift from slab basis to number of subscribers or instalments whichever is higher basis is irrational, because it does not increase the service rendered to Foremen and in no manner increases the work of Chit Registrar at the time of registration, because thereafter fees are levied for each and every stage of the conduct of the chits. Petitioners are only aggrieved regarding the increase in fees for registration of the by-laws and for balance sheets on *ad valorem* basis when filed with the certificate of a Chartered Accountant. The expenses incurred and the amount collected as disclosed in the counter affidavit only shows that the revisions were made to augment the revenue of the State.

8. When minutes for every instalment are being filed, they disclose the required particulars. What is looked at in balance sheets is to find out the total amount collected and the commission received and no other. They do not refer to all the receipts and expenditures of each chit.

It is like insisting the Banking Company to file a balance sheet for each

account, which is an impossibility of performance. From the balance sheet, Registrar cannot ascertain the expenditure for each chit, as the firm engages and spends for the whole work of all the chits. In practice Registrar does not insist on all the columns to be filled in the balance sheet and they relate only to the amount collected in one year and the amount of commission deducted. Even the Chit Auditor does only these things. As for other particulars, they are to be culled out from the minutes filed for every instalment, for which separate fees are collected. The present basis adopted results in highly disproportionate amounts being collected as indicated in para 5 of the reply affidavit which is incommensurate with the services rendered by the Registrar. In the absence of break up figures for the amounts claimed to be spent, it would not be safe to act upon them, when Sub-Registrar does all the functions of Chit Registrar in some places. As for providing iron safes and receptacles, they cannot form part of any services rendered for the benefit of Foremen from whom the fee is collected. Hence, as claimed they are entitled to the writ of declaration.

8. By the time these petitions have been argued out, advocates appearing for the petitioners and learned Additional Government Pleader, have adverted to the undermentioned decisions for comprehending as to whether the impugned levy is a fee or not.

9. In A.I.R.1954 volume there are three decisions reported at pages 282, 388 and 400. In the first one well known as *Shirur Mutt case*, *Commissioner of H.R.E. v. Lakshmindra Thirtha Swamiar of Shirur Mutt*, (1954)1 M.L.J.596= 1954 S.C.J.335= 1954 S.C.R.1005= A.I.R.1954 S.C.282= 67 L.W.1220 (S.C.) it was held that a fee is generally defined to be a charge for a special service rendered to individuals by some governmental agency and that the fee so imposed would ordinarily be uniform and no account is taken of the varying abilities of different recipients to pay. It was further held that it is not possible to formulate a definition that would be applicable to all cases, and that the element of compulsion or coerciveness is present in all kinds of impositions and that fee is no exception, and the primary distinction between a tax and a fee is that a tax is levied as a part of a common burden, while a fee is a payment for a special benefit or privilege, and that public interest is the basis of all impositions, but in a fee it is some special benefit which the individual receives. Hence, it was held that a fee is regarded as a sort of return or consideration for services rendered, and it is absolutely necessary that there must be correlation to the expenses incurred by the Government in rendering the said services. One more factor taken into account was that, if the money, so collected is appropriated specifically for the performance of such work and is not merged in the public revenues for the benefit of the general public, then it would be counted as fees and not a tax.

In the second case known as *R.P.Gandhi's Case*, 1954 S.C.J.480= (1954)1 M.L.J. 718= A.I.R.1954 S.C.388 analysing the provisions of the Bombay Public Trusts Act, reported at page 388 it was pointed out that though primarily fee is imposed in public interest, it is for some special service rendered or some special work done for the benefit of those from whom the payments are demanded and that *quid pro quo* is always an element which is present in fees, but absent when tax is imposed. It was further held that there are two essential elements to find out whether the payment is a fee or not, they being:-

(1) It must be in consideration of certain services which the individuals accpeted either willingly or unwillingly.
(2) It must be earmarked to meet the expenses of rendering such services and shall not go to the general revenues of the State to be spent for general public purpose."

In the third decision reported at page

400. *Sri Jagannath v. State of Orissa*, (1954)1 M.L.J.591= A.I.R.1954 S.C.400 the same principles have been reiterated.

10. In *Hingir Rampur Coal Co. v. State of Orissa*, (1961)2 S.C.R.537= A.I.R.1961 S.C.459 four out of five learned Judges of the Supreme Court have laid down the following essential features between a tax and a fee:-

(1) Tax and fee are compulsory exactions of money by public authorities and there is no generic difference between them.

(2) A fee levied is essentially for services rendered and as such there is an element of *quid pro quo* between the person who pays the fee and the public authority which imposes it.

(3) Services rendered may be to a specific area or to a specific class of persons or trade or business in any local area and as a condition precedent for the same a fee could be collected.

(4) Fee so collected is earmarked and set apart for the purposes of services for which it is levied and does not become a part of the consolidated fund. When a fee is imposed for services rendered, the payer has no right to opt out of it.

(5) In the absence of correlation between the fees collected and the services extended, it loses the characteristics of fees.

(6) Whether the demand made is a fee or a tax is always a question of fact to be determined in the circumstances of each case.

(7) In extending services to a specified class, if indirectly other members of the public are also benefited, it would not detract from the character of the levy as a fee.

(8) The true test in determining its character is to find out, what is the primary object of levy and the essential purpose which it is intended to achieve.

11. It is in *Liberty Cinema Case*, (1965)2 S.C.R.477= A.I.R.1965 S.C.1107, three of the five learned Judges of the Supreme Court, held that what was levied as licence fee under the Calcutta Municipal Act was only a tax. Learned counsel for the petitioners relied upon it to contend that unless the State is able to justify that the levy is for services rendered and intended to confer a special benefit on the person on whom it is imposed, and that in the instant case the Foreman does not derive any of the benefits under the impugned levy and, therefore, the demand is illegal.

12. Learned Additional Government Pleader would refer to para. 6 of the judgment in *Liberty Cinema Case*, (1965)2 S.C.R.477= A.I.R.1965 S.C.1107 wherein it is stated that the Corporation of Calcutta itself contended that the levy was only a tax and not a fee, and further did not dispute that if the levy was fee in the sense mentioned, then it would be invalid. The concluding sentence in the said paragraph is to the following effect:

> ".... A discussion of these aspects of fees will be unprofitable and will only cloud the point really in issue."

Hence, his submission is that, whatever had been discussed in the judgment as to what could be a fee cannot be understood as at variance with what had been held in *Hingir Rampur Coal Co. v. State of Orissa*, (1961)2 S.C.R.537= A.I.R.1961 S.C.459. In the light of the subsequent decisions of the Supreme Court, his further submission is that the services rendered by the State need not be confined only to the persons on whom it is imposed, but when the primary object and the essential purposes have to be looked into, it would take within its fold the benefits derived by subscribers as well.

13. On what is a fee, it was held in *Corporation of Calcutta v. Liberty Cinema*, (1965)2 S.C.R.477= A.I.R.1965 S.C.1107 that:

"1. Nothing turns on the actual word

used as there is no rigid technical meaning in English language for 'fee' indicating that levy is only in return for service.

2. Articles 110(2) and 199(2) of the Constitution of India go to show that fee for licence and fee for services rendered are different kinds of levy and that the former is not intended to be a fee for services rendered.

3. The provisions of the Act must be looked into to determine the correct character of the imposition.

4. It must confer a special benefit on the person on whom it is imposed."

14. In *D.C. and G.Mills Co. v. Chief Commissioner, Delhi*, (1971)2 S.C.J.40= (1970)2 S.C.R.348= A.I.R.1971 S.C.344 the factors taken into account, to ascertain the nature of levy of fees are:

"(i) The entire scheme of the Act, obligation and nature of work done by authorities are to be looked into.

(ii) The expenses incurred for maintaining the personnel for supervising, controlling and regulation of the trade can be taken into account, to find out the reasonable relationship between the levy and the expenses incurred for rendering such services."

It was a case wherein the statistics furnished disclosed that 60% of the amount of licence fee collected was being actually spent on services rendered to factory owners and this was considered to be a sufficient correlation to uphold the levy as a fee.

15. In dealing with the payment of court-fees in *Secretary, Madras Government v. Zenith Lamp*, (1974)1 M.L.J. (S.C.) 43= (1974)1 An.W.R. (S.C.)43= (1973)2 S.C.R.973= (1973)1 S.C.C.162= A.I.R.1973 S.C.724= (1974)1 S.C.J.111 the two factors that were taken into account are:-

(1) Whether there is broad correlationship and that

(2) each case has to be considered on a reasonable and practical view point rather than on a pedantic approach."

16. In dealing with the levy of permission fee for construction of buildings under the Andhra Pradesh Gram Panchayats Act, the Supreme Court after referring to *Shirur Mutt Case, Commissioner of H.R.E. v. Lakshmindra Thirtha Swamiar of Shirur Mutt*, (1954)1 M.L.J. 596= 1954 S.C.J.335= A.I.R.1954 S.C. 282= 67 L.W.220 (S.C.) points out that, if there is total absence of any data regarding the essential features of correlationship, then the levy is illegal; and that the expenses incurred in discharging the obligatory functions under the Act have to be met from and out of the taxes collected and that the fees collected would be only with reference to the services rendered by or intended to be rendered to particular persons from whom the fee is collected.

17. In *Keval Krishna Puri's Case*, (1979)3 S.C.R.1217= (1980)1 S.C.C.416= A.I.R.1980 S.C.1008, decided by five learned Judges of the Supreme Court seven salient tests have been laid down to ascertain as to whether the demand is a fee or not:

"(i) A good and substantial portion of the amount collected must be expended for the purpose for which it is collected.

(2) The services rendered by the authorities to the licensee must be in relation to the activity carried on by him.

(3) It is not necessary to confer the whole of the benefit on the licensees alone, but it would suffice if some benefits are conferred on them and which have a direct, close and reasonable correlation between the licensee and the transactions.

(4) In considering the special benefits on the licensees it could take

within its fold services rendered by the authority in the general interest of all concerned with the transactions in question.

(5) Any direct and remote benefits cannot in any sense be a special benefit to the licensee.

(6) *Quid pro quo* with arithmetical exactitude is not required and authorities must broadly establish that a reasonable amount is spent for rendering services to those on whom falls the burden of paying fees.

(7) At least a good and substantial portion of the amount collected on account of fees, may be in the neighbourhood of two thirds or three fourths, must be shown with reasonable certainty as being spent for rendering services."

Immediately following this pronouncement, four of the five learned Judges of the Supreme Court in *H.H.Swamiji v. Commissioner*, (1979)4 S.C.C.642= A.I.R.1980 S.C.1: (1980)1 S.C.R.368 have stated that the necessity for establishing *quid pro quo* between the fee and the cost of services rendered is a matter which is no longer in doubt or to be debated in view of the principles enunciated in the decisions rendered by the Supreme Court from *Shirur Mutt Case*, (1954)1 M.L.J.596= 1954 S.C.J.335= A.I.R.1954 S.C.282= 67 L.W. 220 (S.C.) upto *Keval Krishnan Puri's Case*, (1979)3 S.C.R.1217= (1980)I S.C.C.416= A.I.R.1980 S.C.1008.

18. As to what has been laid down in *Keval Krishna Puri's Case*, (1979)3 S.C.R.1217= (1980)1 S.C.C.416: A.I.R. 1980 S.C.1008 in *Southern Pharmaceuticals and Chemicals v. State of Kerala*, (1981) Tax. L.R.2838= A.I.R.1981 S.C. 1863 it was held that the observations contained therein pertaining to *quid pro quo* are not intended and meant as laying down a rule of universal application and that this concept is undergoing a transformation. It was further observed that the element of *quid pro quo stricto sensu* is not always a *sine qua non* of a fee. The Constitution of India did not contemplate crediting it to a separate fund and not to the consolidated fund. Article 266 of the Constitution of India was relied upon to show that unnecessary exaggeration need not be applied to the aspect of how the collections made had been credited. The levy of fee may been consideration for a privilege, licence or for service. To secure the privilege, the licensee has to comply with certain prescribed conditions. When supervision is contemplated under the provisions of the Act, there could be no denying the fact that the licensee receives services from the authority. If a broad correlation between the fee collected and the expenses on establishment is disclosed, it would be valid, because the personnel of the establishment extend services to the licencee in complying with the provisions of the Act.

19. Even if the benefit or advantage derived by the payer of the fee is secondary, if it be shown that the primary motive of regulation was in public interest, then the imposition of fee is valid, is the view expressed in *Municipal Corpn. of Delhi Municipality v. Mohd. Yasin*, (1983)2 S.C.J.66= 142 I.T.R.737= (1983)3 S.C.C.229= A.I.R.1983 S.C.617. The Court further held that in finding out correlations, the court should not assume the role of a Cost Accountant as *quid pro quo* is not in the strict sense the one and the only true index to find out whether it is a fee or not. By referring to Article 110 of the Constitution of India, it was held that there are two classes of cases where fee could be imposed:

"1. Where the Government simply granted a permission or privilege to a person to do something which otherwise that person would not be competent to do and extracted from him in return, for heavy or moderate fees.

2. Where the Government did some positive work for the benefit of the person and money was taken as a return

for the work done and services rendered, such money not being merged in the public revenues for the benefit of general public."

20. As to what is meant by the phrase 'payers of the fee' used in the earlier decisions, is explained in *Sreenivasa General Traders v. State of A.P.* (1983)4 S.C.C.353= A.I.R.1983 S.C.1246 as follows:-

> "It is obvious that the phrase 'payer of the fee' used by this court in the authorities referred to above represents collectively the class of persons to whom the benefit is directly intended by the establishment of a regulated market in notified agricultural produce, livestock and not the actual individual who belongs to that class, i.e. the trader ..."

it was then held that what was stated in *Kewal Krishna's Case*, (1979)3 S.C.R. 1217= (1980)1 S.C.C.416= A.I.R.1980 S.C.1008 must be understood as meaning services to the users of the market as well. As for the view in *Kewal Krishna's Case*, (1979)3 S.C.R.1217= (1980)1 S.C.C.416= A.I.R.1980 S.C.1008 about two thirds or three fourths of collections being spent on payers of fees, it was also held that it does not lay down a rule of universal application and it was a decision confined to the special facts of that case and that it was an *obiter*.

21. As pointed out in these decisions, as to whether a particular levy is a fee or a tax, it is a question of fact to be determined in the circumstances of each case by reference to the entire scheme of the Act. The duties, obligations and nature of work done by the authority to those connected with the transaction which is subjected to the imposition of fee and ear-marking the funds collected for that specific purpose, and several factors as indicated in the aforesaid judgments, are to be taken into account and if the State justifies the levy as a fee based on such tests, then alone it will be valid.

22. The first point taken by the petitioners is that there is no power in the State to increase the fees. Amendments were issued by invoking section 63 of the Act. Learned Cousnel for the petitioners submits that, when section 53 specifically provides as to when and under what circumstances fees could be levied, and section 16 which deals with the balance sheets not being enumerated therein, the demand of fees on balance sheets is *ultra vires* of the Act. On behalf of the State, it is stated that though section 63 is mistakenly mentioned in the notification, the power exercised falls within section 53(1)(a) and (g). Section 53 enables the Government to prescribe fees in respect of such of those categories listed in clauses (a) to (f) and other matters as may appear necessary to give effect to the purposes of the Act. Clause (a) deals with the registration of the by-laws of a chit under section 3. Hence, the enhancement of the rate of fees on revised basis that could be adopted for imposition of registration fee, could be done by invoking section 53(1)(a). As for balance sheets section 16 is not one of the sections mentioned in section 53 (1)(a) to (f). But clause (g) states:-

> "Such other matters as may appear necessary to give effect to the purposes of this Act."

The Act is made to provide for the regulation of chit funds in the State of Tamil Nadu. Section 16(2) refers to what a balace sheet should contain. Rule 26 says that it shall be in form No.X. When such balance sheets are filed in the prescribed form, it calls for scrutiny, so that the interests of the subscribers may be safeguarded. This being one of the essential purposes envisaged under the Act, merely because section 16 is not enumerated in clauses (a) to (f), it cannot be held that the fee now imposed relating to balance sheets would not come within the aforesaid clause (g). Such a power being available under section 53 (1)(g) inclusion of balance sheets as one of the

items in Appendix II is within the ambit of the enabling power under section 53. As stipulated under section 53(2), it has been duly published, though section 63 is mentioned section 53(1)(a) and (g) would have been the proper section to be mentioned therein. Once the power is traceable an erroneous indication of section would not invalidate the valid exercise of power. Such mistakes are avoidable, if proper care is taken.

23. The next point taken is that the object stated in the impugned G.O. is totally irrelevant to the purposes of the Act. After referring to the then existing rates of registration fee which was on slab basis, the Director of Chits had stated that the said levy has no relation to the duration of the chit or the number of subscribers benefited and, therefore, it will be equitable and fair to fix the fees by taking into account the number of instalments or duration as well as the number of subscribers benefited under the chit. Hence, taking these into consideration, and in order to rationalise rates, he had proposed an amendment to the rules. Accepting this claim made by him, the impugned G.O. was passed. As to what was the rationalisation claimed at, in paragraph 4 of the counter-affidavit in W.P.No.1333 of 1982, it is stated as hereunder:-

> "... Considering that in respect of chits of longer duration and larger number of instalments, greater amount of service had to be rendered in that, more minutes etc., were filed, it is equitable and fair to fix the fees for registration of by-laws with regard to number of instalments or duration of chits. The fees were revised taking these facts into consideration. It has also to be verified whether the foreman has taken proper security for future payment of subscriptions from the prized subscriber, whether proper receipts were obtained for the payment of prize moneys and on due dates, if not whether the prize amount has been deposited in a Bank as required by the Act by verifying receipts of deposits, etc. The extracts filed in respect of removal, substitution and assignment, etc. have also to be verified and in respect of higher chit amounts in long term chits for longer duration these transactions will be more and they impose greater responsibility on the Chit Registrar. The work connected with watching the filing of various documents by the Foreman on the due dates and in proper form also takes considerable time..."

The rest of the portion in paragraph 4 deals with its justification regarding fees for filing a balance sheet. At the time when an application is made for registration under section 3, none of those factors mentioned therein require to be done by the Registrar. In paragraph 20 it is stated, "I submit that registration fee has nothing to do with the fee levied for filing of the balance sheet. They operate in different fields." When more minutes are filed in respect of chits of longer duration and larger number of instalments, separate fees are collected for each minute. Section 10 states that minutes of the proceedings on every drawing shall be drawn up and entered in a book kept for that purpose. It must contain the particulars mentioned in section 10(2). Under section 11, every foreman shall within 15 days of the succeeding month in which one or more instalments of the same chit or one or more instalments of any other chit is drawn, file with Registrar a copy of the minutes. Rule 14 stipulates sore more particulars apart from what are contained in section 10(2) to be included in the minutes. Section 53(1)(c) authorises the Government to prescribe fees for filing all minutes. Article 4 in Appendix II stipulates the fees for filing a copy of the minutes of proceedings referred to in section 10 and under section 11 at Rs.2. For each minute filed, the fee being collected, at the time of registration, as to whether the longer duration or larger number of instalments calls for increase in services to be rendered, than what was done when the slab system

was in force, is not explained at all. As for the expression etc. ..' no particulars are forthcoming. All other aspects referred to are more or less covered separately under section 53(1)(c) to (f). The impugned G.O. except to point out that the Director of Chits felt that the adoption of a different basis would bring about rationalisation of rates, the respondent State had not placed before the Court either in the form of an affidavit or by producing records as to what were the equitable factors which were taken into account for change of basis or in imposing higher rate.

24. When a Foreman starts a chit, under section 3 he has to apply for registration of the by-laws. It is only thereafter, he can approach the subscriber and get the chit agreements as prescribed under section 5 executed, and file them under section 6. He cannot commence the business till he secures the certificate under section 7(3). Therefore, when an application is made for registration of by-laws, at that stage, section 3(3) authorises the Registrar to find out as to whether the by-laws are in accord with the provisions of the Act or the rules made thereunder. As to what the by-laws should provide, rule 3 enumerates them. An application for registration is to be in Form No.1 accompanied by fees set out in Appendix No.II. Hence, the number of the subscribers or the instalments, have no nexus with what are required to be done under section 3(3) by the Registrar. Whether they are more or less, it was only a question of furnishing particulars and recording them and no more. If for the entire period of the chit except the registration fee, no other fee is demanded and the entire services rendered are covered by this demand alone, then the correlation claimed could be available. Section 53 enables imposition of fees in respect of almost each one of the subsequent stages of the conduct of the chit whenever the authorities are to be approached or they are to exercise their powers. In the context of such provisions having been made in the Act, the registration fee claimed has to be restricted to what are required to be done under section 3(3). Realising this predicament, the State has not placed before the Court as to how and in what manner, the revision effected has brought about rationalisation. As to how and to what extent a chit with a longer duration or instalment could call for increased services to be rendered compared with another of lesser duration or instalment, for the purposes mentioned under Section 3, is not exemplified. The only attempt made is to show that later on during the conduct of the chit, it would call for increased services, but this has no relevance in a case of this nature where for each and every subsequent step taken, a chit operator has to pay out fees enumerated in Appendix II. The limited justification spelt out in para. 4 of the counter affidavit being practically no justification at all and the so called rationalisation having no nexus with what requires to be done at the stage of registration, the adoption of a revised basis in the impugned G.O. is illegal.

25. Learned Additional Government Pleader would then submit that when it is a registration fee, the test of *quid pro quo* need not be satisfied as it is a regulatory measure, and hence, the extent of services at the stage of registration whether existing or not, cannot be highlighted.

26. In *Kewal Krishna Puri v. Punjab*, (1979)3 S.C.R.1217= (1980)1 S.C.C.416= A.I.R.1980 S.C.1008 on referring to the *Chief Commissioner, Delhi and another v. The Delhi Cloth and General Mills Co. Ltd., and others* (1978)2 S.C.J.142= (1978)2 S.C.C.367= A.I.R.1978 S.C.1181 it is stated as follows:-

> "Rendering some service, however remote the service may be, cannot strictly speaking satisfy the element of *quid pro quo* required to be established in cases of the impost of fee. But then, as pointed out, in some of the cases noticed earlier the registration fee has been taken

to stand on a different footing altogether. In the case of such a fee the test of *quid pro quo* is not to be satisfied with such direct, close or proximate correlationship as in the case of many other kinds of fees. By and large registration fee is charged as a result of regulatory measure."

It is not held that the aspect of services to be rendered is absolved from consideration when registration fee is charged, and what has been pointed out is that the same close or proximate correlationship as will have to be established for other categories of fees may not be required when justification is put forth regarding registration fee. In the reply affidavit the petitioners have shown that there is a highly disproportionate and irrational increase in registration fees. In spite of the maximum amount of Rs.200 which was prevailing for a chit of value exceeding Rs.50,000 and for a term of one year and above, it will be Rs.1000 which means five fold increase. Merely because it is held that registration fee is a regulatory measure, it would not mean that any rate can be fixed having no nexus to what services are contemplated for that purpose under the Act. Furthermore, the increased levy is not due to any amendment effected ralating to registration of by-laws calling for nature of services to be extended than what were obtaining prior to the G.O. When the nature and extent of services envisaged under section 3(3) having remained the same, unless it be shown that for extending the same services, the expenses had increased, the demand made partakes the character of a tax. It is claimed by the State that the revision has been made only after two decades. In 1964, it was Rs.25 for registration of by-laws. It was enhanced in 1969 on slab system which was a minimum of Rs.50 and the maximum at Rs.200. Hence, it would not be correct on the part of the State to claim that for two decades there had been no revision. Hardly within two years of 1979, the rates having been revised, it is the bounden duty of the State to disclose as to how within a period of two years, the expenditure had increased to such an extent as to result in such high rates being fixed. As to what are the expenditures incurred and collections made will be dealt with later on. The figures furnished by the State go to show that during the relevant years, the income derived is nearly double and more.

27. As for Article 8-A in Appendix II relating to filing of balance sheets audited and certified by Chartered Accountants are concerned, it is submitted by petitioners that there is a hostile discrimination and it acts as an unreasonable restriction on their trade and it is violative of Articles 14, 19(1)(g) and 301 of the Constitution, Section 16(1) prescribes that every Foreman shall prepare and file with the Registrar a balance sheet duly audited either by auditors duly qualified to act as auditors of companies under the Companies Act, 1956 or by a chit auditor appointed under section 51(2) of the Act, and that it shall contain a summary of the assets and liabilities of the chit and furnish such other particulars as will disclose the nature of the assets and liabilites and how the value of the assets has been arrived at. Rule 26 states that a balance sheet shall be in form No.X. Rule 27 stipulates that it shall be prepared by the Foreman when the duration of the chit does not exceed one year on the termination of the chit and if it exceeds one year, then on the expiry of every period of 12 months and also on the termination of the chit, it should be filed within two months from the date of the said period. From No.X catalogues the particulars to be furnished relating to (1) receipts and expenditure, (2) statement of assets and liabilities, (3) Details of Investment, (4) Assessment of value of investment, and (5) profit and loss account. The Foreman has to certify regarding the correctness and also the auditor to certify that the balance sheet is drawn up in conformity with the provisions of the Act and the Rules framed.

thereunder. An option is given to a Foreman either to file the balance sheet audited by a Chartered Accountant or by a Chit Auditor. Under section 51(2), a Chit Auditor is appointed by the Director of Chits. It is stated by the learned Additional Government Pleader that the Chit Auditors belong to the department who are not qualified Chartered Accountants, but they are trained to scrutinise chit accounts. The fee charged when a chit auditor is approached is the same as charged when a balance sheet certified by a Chartered Accountant is filed. It is strenuously pleaded by the petitioners that when distinctly different services are contemplated as between them, the imposition of the same rate of levy of fees is a hostile discrimination and an unreasonable restriction on the petitioners' trade. As to what requires to be done by a Chit Auditor calls for consideration vis-a-vis what is done when a balance sheet certified by a Chartered Accountant is filed before the Registrar. Rule 28 deals with what requires to be done when a Chit auditor is approached for certifying balance sheet and profit and loss account. If a foreman desires to have the balance sheet and profit and loss account audited by a Chit Auditor, after the preparation of the balance sheet he must make an application under rule 28(1) to the Registrar for such audit to be done specifying whether it shall be at the premises of the Foreman or not and the application is to be accompanied by fees prescribed under Article 8 of Appendix II. Thereafter, the Registrar will forward the application to the Inspecting Officer, who shall cause the balance sheet and profit and loss account to be audited by the Chit Auditor and in turn, he would send it to the Chit Auditor, who shall thereupon require the Foreman to produce the chit records on such date, time and place as he may fix and it would then be the duty of the Foreman to produce "all registers, books of accounts and other records relating to the chit accordingly and furnish such information and give such facilities as may be necessary or required for the proper audit of the balance sheet and profit and loss account at the time and place fixed by the Chit Auditor." A notice of not less than seven days shall be given to the Foreman as to the date of audit at the premises of the Foreman or for the Production of registers, books of accounts and other records relating to the chit as the case may be. After scrutiny of all these documents under Rs.29 the Chit Auditor will prepare his report and issue the certificate in quadruple and send only a copy to the Foreman, the second to the Registrar and third to the Inspecting officer and keep the last copy for his own file. Rs.30(1) enjoins upon the Foreman to file with the Registrar a copy of the balance-sheet and profit and loss account together with the audit certificate and the auditor's report within one month from the date of receipt from the Chit Auditor or within four months from the last date of the period covered by the balance sheet whichever is earlier. Whereas, when a certificate is secured from a Chartered Accountant, Rule 30(2) directs the Foreman 'to file' with the Registrar the documents which are referred to in sub-rule (1) of rule 30 within three months of the expiry of the period with reference to which the balance sheet is prepared under rule 27.

28. Hence, when a balance sheet certified by a Chartered Accountant is produced, the Registrar would be concerning himself only with regard to the particulars incorporated in the balance sheet, profit and loss account, the auditor's certificate and the report of the auditor. Under the rules as framed, there is no need at all for the Foreman to produce before the Registrar all registers, books of accounts and other records relating to the chit accordingly and furnish such information and give such facilities as may be necessary or required .." for verifying the correctness of the certificate issued by the Chartered Accountant. The respondents submit that even when a balance sheet prepared by a Chartered Accountant is filed it has to be scrutinised by the department along

with all records and that the expenditure incurred is equal to the amount spent for the services rendered when a Chit Auditor does it. While scrutinising, if the Registrar finds that it is not in accordance with the provisions of the Act and the Rules framed thereunder, he would have to take suitable action and in appropriate cases before ordering release of the security, they will have to be scrutinised. In conclusion, it is stated as follows:

> "I submit that pursuant to the filing of the balance sheet, records have to be verified. The balance sheet has also to be examined in detail to find out whether it is in conformity with the object of the chit and also whether the figures tally with regard to the collections and payments of prize amounts and whether the prize amount also correctly reflects the scope of each chit and whether the commission of the foreman has been correctly worked out. In short, the whole matter has got to be thoroughly examined to see whether that particular year's transaction fully reflects the scope of each chit and whether the collections and disbursements including the commission retained by the foreman have all been done in conformity with the Act and the Rules since it is the subscriber's interest which is paramount. I submit that all these involve the services of the staff of the office of the Registrar."

The claim made is not in accord with what is found in rule 30(2). Under the rules only when a chit auditor prepares a balance sheet, registers, books of account and other records and other information have to be furnished, under rule 30(2), they are not required to be submitted, when a Chartered Accountant's certificate is filed, it cannot be said that in all these cases where such certificates are filed, once over the same work done by a Chit Auditor is carried out justifying the same rate of fee being charged. It may be that whenever any irregularities are found, it may call for a fresh clarification from the foreman, but that would not mean that for all the chits without exception the Registrar discharges the same kind of services as done when a Chit Auditor is requisitioned. It must be pointed out that when fee is collected under article 8 it includes the services rendered by the Chit Auditor and also the services of scrutiny by the Registrar, who acts upon such certificates whereas for the same fee paid when a Chit Auditor's Certificate is filed, it results only in scrutiny by the Registrar and nothing more. Hence, to treat unlike situations as one and the same and impose same rate of fees is arbitrary and illegal. When rules themselves do not contemplate production of registers, books of accounts and other records, the claim made that pursuant to the filing of the balance sheet, records have to be verified and that the whole matter has got to be thorougly examined is unaccpetable. In such of those matters where irregularaties are noticed, the Registrar can call for all the records and scrutinise them and thereafter initiate prosecution or take such other action. Such instances would arise in both categories. Hence when the rules themselves contemplate a different type of services to be rendered when Chartered Accountants' certificates are filed, the fee imposable under article 8-A cannot be the same as in article 8 which contemplates more comprehensive services to be rendered. Therefore, as rightly pleaded by the petitioners, the necessary element of *quid pro quo* is not existing, and furthermore, this is an unreasonable restriction on the right of trade and the rate fixed is aimed at increasing general revenues. It is of pointed interest to note that right from the inception of the Act, such a fee was never contemplated and that the Director of Chits drew inspiration from what is obtaining in Kerala and his proposals have been just accepted by the Government without any analysis being made of what rates could be fixed on conditions prevailing in Tamil Nadu. As to what are the provisions governing the Act in force in Kerala and what nature of services are

rendered by those authorities are not spelt out. The conclusions arrived at are not to be understood that the State is disentitled from imposing fee for filing of such balance sheets under article 8-A. A rate which would be commensurate to the nature of services extended by the departmental personnel could be fixed, but what is now charged being identical to the fee imposed under article 8, it is an illegal imposition.

29. Lastly, on behalf of the State it is pleaded that when fee is imposed under an enactment, the entirety of the collections made under different heads must be taken into account as a whole for totality of services rendered, and in the light of the decisions of the Supreme Court if it be disclosed that a good and substantial portion of the amounts recovered, is spent towards all the specific purposes and services contemplated under the Act, then the impugned levies are only fees and not otherwise. By referring to the decision in *Kewal Krishna Puri v. Punjab*, (1979)3 S.C.R.1217= A.I.R. 1980 S.C.1008 it is pointed out that if the demand made is of a regulatory nature, there is no need to look for *quid pro quo* regarding registration fee and it can be any rate as the State may choose to fix. As for the nature of service extended, as held in *Kewal Krishna Puri v. Punjab*, (1979)3 S.C.R. 1217= A.I.R.1980 S.C.1008, *Southern Pharmaceuticals and Chemicals v. State of Kerala*, (1981) Tax.L.R.283= A.I.R. 1981 S.C.1863 and *Srinivasa General Traders v. State of A.P.*, (1983)4 S.C. C.353= A.I.R.1983 S.C.1246= 96 L.W. (S.C.) 159 (S.N.) the benefit accruing to the payer alone cannot be taken into account and that benefits accruing to those connected and interwoven with the activities of the payer and who would be benefited by supervisors made over the payer would also be relevant. The rights of subscribers have to be safeguarded because they are the active participants in the chits, which got registered through the Foreman. Provisions having been made in the Act for penalties to be imposed, etc., to safeguard the rights of subscribers the expenditure incurred in supervision, control and regulation by the constituted authorities under the Act, forms part of the expenditure incurred in extending the special benefits to all of them. In dealing with what benefits accrue to subscribers as well under this Act in *Tuticorin T. and C. Corporation P. Ltd. v. State of Madras*, (1961)1 M.L.J. 313 it was pointed out that the Act is intended to provide a measure of safety to subscribers. A similar Act enacted for Pondicherry was also held to benefit subscribers, *C.C.Fund v. Union Territory of Pondicherry*, A.I.R. 1972 Mad.99= 84 L.W.515. Hence the concept of levy in relation to payer of fees spelt out in *Corporation of Calcutta v. Liberty Cinema*, (1965)2 S.C.R.477= A.I.R.1965 S.C.1107 and *Government of A.P. v. Hindustan Machine Tools*, (1975)2 S.C.C.274= (1975) Tax. L.R.2013: A.I.R.1975 S.C.2037, cannot assist the petitioner because the traditional concept of *quid quo* is undergoing a sea of transformation as pointed out in *Southern Pharmaceuticals and Chemicals v. State of Kerala*, (1981) Tax.L.R.283: A.I.R.1981 S.C.1863.

30. Resting on these contentions, the Statement of receipts and expenditure for the period from 1976-1977 to 1983-84 as found on page 6 of the counter-affidavit in W.P.No.1333 of 1982, and the supplemental statement filed later on are relied upon to plead that *quid pro quo* is established to a broad and reasonable extent:-

	Receipts	*Expenditure*	
	Rs.	Rs.	
1976-77	4,34,127	6,54,759	-1,20,372
1977-78	4,05,598	7,32,548	-2,81,950

1978-79	4,03,675	8,27,706	-4,24,071
1979-80	7,99,308	9,14,452	-1,20,144
1980-81	14,45,161.75	9,14,452.45	+1,15,143.95
1981-82	22,24,060.50	14,88,541.45	+7,95,519.03
1982-83	34,12,574.75	14,88,852.51	+19,23,722.24
1983-84	37,65,495.48	16,82,946.60	+20,76,548.90

312 It is claimed that special staff is employed for discharging the functions and duties under the Act. The hierarchy in the services are furnished in para. 8 of the counter affidavit. Apart from the expenses incurred on them, the Government has spent on receptacles and iron safes for the preservation of records and securities. It has been repeatedly pointed out by the Supreme Court that it is unnecessary for the State to prove with arithmetical exactitude, and that court need not be called upon to function like a Chartered Accountant and what is required is to find out whether a broad and reasonable relationship exists between the levy imposed and the services extended.

32. In *D.C. and G. Mills Co. v. Chief Commissioner, Delhi, (1971)2 S.C.J.40= (1970)2 S.C.R.348= A.I.R.1971 S.C.344* it was indicated that if 60% of the amount is spent on the specific purpose, it should be a satisfactory proof. In *Kewal Krishna Puri v. State of Punjab*, (1979)3 S.C.R.1217: A.I.R.1980 S.C.1008 one of the seven tests is that at least a good and substantial portion of the amount collected which may be in the neighbourhood of two thirds and three fourths must be shown as being spent for the earmarked specific purposes and then it can be taken as a reasonable percentage spent for rendering the services of the kind relied upon by the State. But learned Government Pleader refers to *Sreenivasa General Traders v. State of A.P.*, (1983)4 S.C.C. 353= A.I.R.1983 S.C.1246= 96 L.W. (S.C.) 159 (S.N.) and *Southern Pharmaceuticals and Chemicals v. State of Kerala*, (1981) Tax.L.R.2838= A.I.R.1981 S.C.1863 to contend that the sixth and seventh tests in *Kewal Krishna Puri's Case*, (1979)3 S.C.R.1217= A.I.R.1980 S.C.1008 cannot be understood as laying down rules of universal application and must be confined to the facts of that case.

33. Percentages indicated cannot be relevant indicia, but the aspect of *quid pro quo* is a relevant test to be applied to find out whether there is a broad relationship between the funds recovered and the amounts expended for carrying out the special services contemplated under the Act. As pointed out in *H.H.Swamiji v. Commissioner*, (1980)1 S.C.R.368= (1979)4 S.C.C.642= A.I.R.1980 S.C.1 whether there is fair correspondence of proximation to justify the demand has to be proved by State. In this perspective, even taking into account the totality of income and expenditure for all services rendered under the Act, it transpires that after the increased fee was imposed in 1980-81 in spite of the deficit which was experienced in the earlier years, the excess collected in 1981-82, itself was Rs.7,95,519.03. This is nearly 70% more than expenditure. In subsequent years figures go to show that surplus on hand was more than the amount spent. In the following year also, the same has happened. Now that the Central Act has come into force on 13th April, 1984, these figures are apposite. The learned Additional Government Pleader contends that the recoveries hitherto made immediately after the impugned levies cannot alone be taken into account, because in future the situation may change. Since the Act has come to an end

the plea is without substance. As and when the expenditure increases for the services rendered, nothing precludes the State from periodically increasing the fees, so as to be commensurate with the services extended. The, totality of recoveries made over a reasonable period of years could certainly be looked into find out whether the increase is justified or not. Loss was incurred preceding the impugned G.O. is made out. It called for a revision, but that by itself would not justify a disproportionate increase unrelated to anticipated expenditure, how that the period is circumscribed, the amounts recovered during relevant years subsequent to the impugned levies can be looked into to find out whether the tests laid down by the Supreme Court are satisfied or not. The income derived by the State, subsequent to the enforcement of the Central Act is not taken into account. Thus it is quite apparent on particulars furnished by State that the rates fixed were disproportionately high having no nexus to nature of services rendered, and is intended to augment revenues partaking the character of tax. Hence the impugned levies suffer from the vice of arbitrariness, hostile discrimination and unreasonable restriction on trade.

34. For all the reasons above stated Articles 1 and 8-A in Appendix II to the Tamil Nadu Chit Funds Rules, 1964 are struck down as invalid resulting in the writ petitions being allowed with costs. Counsel fee Rs.250 in each petition.

R.S. ——— *Petitions allowed.*

[End of Volume (1985) I.M.L.J. (Reports)].